United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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United States Court of Appeals

For the Second Circuit

Index No. 67 Civ. 1137 (RJW).

ILIGAN INTEGRATED STEEL MILLS, INC., CONTINENTAL INSURANCE COMPANY, STANDARD MARINE INSURANCE COMPANY LTD., ROYAL INSURANCE COMPANY, LTD., FIREMAN'S FUND INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY OF NEW YORK, EMPLOYERS COMMERCIAL UNION INSURANCE COMPANY and AETNA INSURANCE COMPANY,

Plaintiffs-Appellants,

—against—

SS JOHN WEYERHAEUSER, her engines, boilers, etc., WEYERHAEUSER COMPANY, and NEW YORK NAVIGATION COMPANY, INC.,

Defendants-Appellees-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFFS-APPELLANTS ILIGAN INTEGRATED STEEL MILLS, INC., et al

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Jurisdiction

The decision of the United States District Court for the Southern District of New York was entered on March 14, 1974. Final amended judgment was entered on April 18, 1974. Appellant, Iligan, filed a notice of appeal on April 19, 1974. Appellee-cross-appellant Weyerhaeuser filed a notice of appeal on April 23, 1974. Appellee-cross-appel-

lant, New York Navigation, filed a notice of appeal on May 3, 1974. The record on appeal was transmitted to the United States Court of Appeals for the Second Circuit on June 3, 1974. The jurisdiction of this Court rests on 28 U.S.C. §1291.

Statement

Appellant, Iligan Integrated Steel Mills, Inc. (Iligan) sued appellee-cross-appellant, Weyerhaeuser Company (Weyerhaeuser) and appellee-cross-appellant, New York Navigation Company, Inc. (New York Navigation) to recover over $2,000,000.00 damage caused to its cargo. The cargo arrived at destination in a flooded hold caused by a deteriorated clapper valve. Weyerhaeuser defended on the ground of due diligence, limitation of liability to the value of the ship and the $500.00 per package limitation; New York Navigation defended on the ground it violated no duty and on the $500.00 per package limitation and claimed an action over against Weyerhaeuser.

The trial was held from July 17, 1972 to July 20, 1972 before the late Honorable Edward C. McLean, who died after all the evidence and briefs were in but before rendering an opinion.

The case was reassigned to the Honorable Robert J. Ward under a stipulation that he could decide the case on the record as made before Judge McLean.

Judge Ward found both appellees liable to appellant, but granted each a limitation of $500.00 per package and gave New York Navigation an indemnity over against Weyerhaeuser.

Appellant brings this cause here and seeks a modification of the judgment and a full recovery for reasons set forth *infra*.

Facts

This is a novel question. For the first time a Court has held that a carrier who loads cargo into a hold with knowledge that it will be damaged by sea water is entitled to the package limitation when that inevitable damage occurs.

To be sure, Judge Ward did not hold that the carrier knew the damage was certain, but the uncontradicted testimony is that the Master and the carrier's managing personnel either knew it to be a certainty or should have known.

Iligan, building a steel mill in the Philippines, contracted with New York Navigation for the shipment of the machinery to that country. The Agreement, dated July 11, 1966 (App. 1) provided *in Clause (1)*, that New York Navigation would "provide . . . suitable and seaworthy vessels . . .".

The Agreement set freight rates, demurrage and dispatch, which varied depending on circumstances and types of ships chartered and further provided:

> "(11) In all other respects the loading and transportation herein shall be performed in accordance with NYNAV's standard bill of lading, copy of which is appended to this Agreement. In the event any clause in such bill of lading is inconsistent with any part of this Agreement, this Agreement shall be controlling. NYNAV agrees to stamp all bills of lading as follows: 'All the terms and conditions of this bill of lading are subject to and governed by the written contract entered into between IISMI and NYNAV for the performance of this transportation'."

* * *

Article (16) called for arbitration in case of any dispute and stated that:

> "Performance under this Agreement shall continue during any such resort to arbitration. The Arbitra-

tors in resolving any dispute to the extent that it is necessary to take into account controlling laws shall use the laws of the State of New York."

In Article (18) the parties provided that:

"This contract and all matters relating hereto shall be deemed to be a Contract made under the laws of New York and shall be governed by and construed in accordance with such laws."

New York Navigation thereupon chartered the S. S. JOHN WEYERHAEUSER from Weyerhaeuser under a time-charter form but for one voyage only. (App. 391).

On December 11th the first shipment of Iligan's cargo was married to the vessel at Baltimore. Mr. Jay Best, Iligan's representative was there* (App. 117a) as was an officer of New York Navigation. (App. 94). The loading was completed on December 16, 1966 at which time New York Navigation's regular form of bill of lading was issued by New York Navigation's agent "as agent for the Master". It was not issued by New York Navigation. (App. 35).

On its face, the bill of lading states it shall govern the relations "between the shipper, consignee, owner of the goods, holder of this bill of lading and the carrier, Master and ship . . .".

New York Navigation is neither the carrier, the Master nor the ship.

It then incorporates the U. S. Carriage of Goods by Sea Act and adds ". . . and nothing herein contained shall be deemed a surrender by the carrier of any of its rights . . .", etc. . . . The . . . Act . . . shall govern . . . throughout the entire time the goods are in the custody of the carrier. The carrier shall not be liable . . ." etc.

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* He spoke with the Master, but was told nothing about the condition of the ship. (App. 117a, 118a).

Clause (1) of the bill of lading gives the "carrier" the benefits of the Limitation Act and states:

> "If the ship is not owned by or chartered by demise to the Company designated herein (as may be the case notwithstanding anything that appears to the contrary) this bill of lading shall take effect only as a contract with the owner or demise charterer, as the case may be, as principal, made through the agency of the Company designated herein which acts as agent only and shall be under no personal liability whatsoever in respect thereof."

Clause (2) stipulates that:

> ". . . the word 'Carrier' shall include the ship, her owner, master, operator, demise charterer, and if bound hereby the time charterer, and any substituted carrier, whether the owner, operator, charterer, or master shall be acting as carrier or bailee . . .".

It is clear throughout that the bill of lading is a contract with the carrier only, that is, with Weyerhaeuser.

Iligan's cargo consisted of 1,087 sophisticated pieces or parts of a modern steel mill. 188 pieces with an approximate value of $2,655,000 were stowed in lower hold #2.

At the time this cargo was placed aboard the ship in Baltimore, the SS John Weyerhaeuser, was 22 years old. At some time prior to this voyage, Weyerhaeuser had removed the watertight steel bulkhead which separated hold #2 from hold #3, creating a very large common hold.

This ship, like Weyerhaeuser's other Liberty ships, of which it owned six, sailed in a pattern. She would be offered to the public for general cargo from United States East Coast ports to Asia and from Asia to the United States

Northwest. She usually carried Weyerhaeuser lumber from the United States Northwest to the East Coast.

The archaic Liberties were subject to all the usual frailties of old age and some which were endemic, unique and typical only of their design (App 571a). For example, for the evacuation of waste from the crew's quarters a pipe descended on the port and starboard side of the ship from the living quarters through the cargo holds and exited through the hull of the ship on each side. Where the pipe made a 90° turn to go through the skin of the ship there was a valve, called a clapper or storm valve, which allowed waste products to go out and, *when it worked*, kept sea water outside of the ship. Unfortunately, because of the nature of the use of this pipe and valve, corrosion and rust formed at the valve and at the bend of the pipe. If not inspected regularly and attended to, the valve eventually froze open and the pipe developed a "wastage" hole. As a result liberty ships often leaked seriously in this way. *The SS John Weyerhaeuser leaked seriously in this way through both the port and starboard clapper valves and soil pipes* of the #3 hold, not just on the instant voyage but also on the two prior voyages. Weyerhaeuser did absolutely nothing to correct it although it knew the hold leaked before Iligan's cargo was loaded into it. New York Navigation made no inspection of the ship, despite its express and implied warranties of seaworthiness.

One hundred eighty-eight pieces were stowed in the #2 lower hold, which was common to the #3 lower hold. Between #2 and #3, New York Navigation constructed a non-watertight wooden bulkhead, referred to as a false bulkhead (App. 146) because it knew it would load fertilizer (tri-sodium phosphate) into #3 lower hold at Tampa.

While Iligan's cargo was being loaded, the readings in #3 port bilge reached 18″ on December 15th and 16th,

1966, A... and P.M. (App. 75) to the Captain's knowledge. (App. 146).

The ship arrived at Tampa on December 23, 1966, and took aboard about 7,000 tons of phosphate, 3,000 tons of it in the common hold with Iligan's cargo (App. 141). This brought the ship down to its summer marks, and the proof of water entry is then very graphic. On various days from December 24, 1966, to January 13, 1967, when the ship departed Cristobal, the soundings in the #3 port read 25″ 30″, 24″, 27″, 35″, 38″, 24″, 26″, 30″. At all such times then, the common hold is flooded. The other bilges are comparatively dry and do not require pumping. On certain days, e.g., on January 7, 1967, when the sounding reads 30″, there is no recording of pumping in the engine log. Oddly enough in earlier days, e.g., in Madras from August 14, 1966 to August 29, 1966, the engine log shows vigorous pumping when there is no record of sounding in the deck log.

The defendants delayed the vessel at Cristobal for engine repairs for a period of fifteen days. At this time NOTHING WAS DONE TO PREVENT THE INGRESS OF WATER. (Captain Dumble maintained that he still didn't know *why* water was entering the ship). Certainly at this time something should have been done even if it meant removing cargo to get at the source of the trouble.

While crossing the Pacific, the soundings are invariably high for #3 port with that hold showing regular flooding. #3 port is also pumped continually. The highest water recorded during that crossing was 40″ but it is established that the water level reached at least 13-14 feet (App. 198a, 195).

Upon arrival at Moji, Japan, where she was to take on 1,200 tons of fuel, the captain was unable to do so because the ship was still down to her summer marks (App. 100-

101, 142, 192-193). He estimated she had taken aboard 1,200 tons of sea water. (App. 193).

Surveyors for all the parties agreed that the cause of the entry of water into the #3 lower hold was a deteriorated, rusty, corroded storm valve (Davies, Watts, Mandle, Baumgartner, etc.). The swing valve on the inside, which was supposed to keep out sea water had rusted solid in an open position (App. 376). On the bottom of the valve there was a hole caused by wastage of about ½" x 4" (App. 378, 369a). There were other rusty and wasted places on the valve (App. 376-9), and the water came in a steady stream (App. 195), even after the first cement box had been installed over it. The starboard valve also leaked to a lesser degree (Surveys, App. 363).

Upon arrival at Iligan City, everybody agreed the sea water had mixed with the phosphate and had come through the wooden bulkhead (Davies, Bumble, etc.). Jackhammers had to be used in an effort to clear some of the machinery but to no avail. (Davies). The cargo was damaged in an extent of about $2,200,000 (Watts, App. 408) and was no longer in specie.

The Prior Voyages

The vessel sailed from Hopewell, Virginia in June, 1966 bound for Madras, India with a full cargo of fertilizer.

The trip was apparently uneventful until about August 13, 1966 at Madras, when the deck log and the engine log show an unusual and abnormal entry of water into, and the continuous pumping of the #3 port bilge.* For example, from August 13, 1966, to September 5, 1966, the engine log indicates that the #3 port and starboard bilges are pumped continuously or during virtually each and every watch. The other bilges, though, were comparatively dry.

*See the chart prepared by Iligan's marine expert from the logs, which shows the entry of water and the pumping operations for all 4 voyages. (App. 75).

All witnesses testified that it is unusual for a vessel to require so much pumping.

The testimony in this case is that the storm valves exit through the hull of the ship about 22 feet above the bottom of the lower hold. The result is that when the ship is loaded to a draft of 25', the valves are submerged beneath the sea. When the ship is light, the valves are above the sea. Of course, in heavy weather a small amount of sea water may still enter the valve even though the ship be light. Liquid waste from the toilets would always enter the cargo hold if the valve or pipe is holed (App. 549a).

The SS John Weyerhaeuser sailed from Madras to Portland in ballast, that is, without any cargo. The records show on this leg of the voyage, no significant entry of water into #3 bilges.

The vessel took aboard in the Northwest a full load of lumber owned by defendant Weyerhaeuser. The records show that on this voyage from the Northwest to New England, there was considerably more water entering the #3 port bilge. On November 15th and 18th, 1966 and on December 5, 1966, the reading was 24". Inasmuch as the bilges are only 18" deep (App. 263a), this put the cargo 6" under water in #2 and #3 lower hold.

Such was the condition of the ship *anent* the #2 and #3 lower hold when Weyerhaeuser delivered it at Baltimore for the carriage of Iligan's cargo.

The Master's Knowledge

Captain Dumble knew #3 was leaking as far back as the Madras voyage, for he testified that #3 port bilge showed water during that voyage (App. 92-93); that #3 port bilge required much more pumping on the two prior voyages than any other hold (App. 115-7); that that was significant and there might be a reason for it (App. 117, 545a). The Madras cargo was delivered wet (App. 334). He knew that on the coastwise voyage only #3 port showed

water over the bilges (24") into the cargo hold (App. 130); and that is excessive and unusual (App. 128-9). His "sweat" theory is untenable since the #3 port continued to show the high readings and the other holds did not. (App. 75).

Attached hereto as Exhibit A is the record of the dimensions of the various holds of the ship in 1966.* Hold #3 is the largest single hold. The sounding and pumping records for #5 hold on the coastwise voyage do not support Captain's "theory". (Pl. Ex. 75)**

In Portland, after the Madras voyage, Captain Dumble told Mr. Baumgartner, his marine superintendent, "that this bilge was showing water and we had to keep pumping it out". (D. 47, 51-53, 62). This was his report to the shipowner through the person in charge of all repairs. (D. 47).

At Cristobal, with the water pouring into #3 port (35", 40"),*** he presumes he told his operating manager, Mr. Mandle of this abnormal entry of water (App. 161-162).

> "I don't know if I told him how high it was, but I have an idea I told him that there was water getting in that port bilge." (App. 162).

He was referring to the same old recurring trouble. (App. 162). When the new chief engineer came aboard in Baltimore, Captain Dumble told him ". . . we had a lot of trouble." (App. 207-217).

Judges are social architects and the law as an instrument of guidance for society is carefully structured.

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* The page is from the Lloyds Register of Shipping, the "bible" for shipping people.

** Captain Dumble said #2 and #3 holds had more "sweat" because they were close to the engine room. #4 hold is just as close to the engine room and no "sweat" problem was noted.

*** The carpenter reported soundings of 6' or 72", but this is not reflected in the log book (D 103). Defendants have not explained this failure in keeping the log.

The shipping industry must learn from this decision that a shipowner's responsibility to correct *known* defects in his ship is absolute; that he may not sacrifice cargo and safety for the sake of the ship's schedule (App. 226, 263-4) or because of a company policy against foreign repairs (App. 175, 395) or because he is phasing out his business (App. 262) or in reliance upon a limitation of liability (App. 757a).

The Knowledge of the Operating Engineer, Mr. Mandle, The Marine Superintendent, Mr. Baumgartner and the Port Engineer, Mr. Balkunas

As for the supervisory officers of Weyerhaeuser, the testimony is that the logs, deck and engine both, were mailed, delivered or handed to them at the end of every voyage (App. 253). The purpose of this is for the logs to be read by the marine superintendent (Baumgartner) and the port engineer (Balkunas) under the supervision of the operating engineer (App. 323). In this way they will spot any trouble they have not learned of by cable, letter or telephone (App. 251). This is done according to company rules and it was done (App. 323). Mr. Balkunas was not produced by Weyerhaeuser, but Mr. Baumgartner whose main duty is to repair the ships, admitted he "perused" the log (App. 255) and was looking for unusual occurrences. (App. 255) He admitted that continuous pumping in one hold and not in others meant a leak (App. 261). A leak can be found by the amount of water generated in a particular hold (App. 255-6).

Mr. Baumgartner said we can assume he received the logs following the prior voyages (App. 255). They were either mailed from Madras or Baltimore or when books are completed (App. 253). Mr. Baumgartner had no answer as to why he made no investigation of the vast entry of water shown by these logs which undoubtedly were sent or handed to him and were read by him, according to Mandle (App. 323).

On top of the knowledge in the logs, Captain Dumble was very positive that when the ship arrived in Portland after the Madras voyage, he "told [Baumgartner] that this bilge [#3] was showing water, and we had to keep pumping it out (App. 118). Entry of water like that is abnormal and unusual (App. 108) and it was his duty to report it to the shipowner which he did (App. 107, 118). He testified he asked Baumgartner to check for a leaking plate and that Baumgartner did and found no leaky plates (App. 120). Baumgartner told him it couldn't be a feedback of fresh water (App. 121). Baumgartner remembers talking with Dumble in Portland, but doesn't remember Dumble telling him about the leak. (App. 246).

Dumble also testified he probably told shipowners of leaks again while the ship was at Baltimore (App. 265a) and probably again while the ship was at Cristobal for 2 weeks (App. 275a), with readings in #3 of 38". "The same old recurring trouble". (App. 275a).

We have then the knowledge of the wet Madras cargo, the graphic log readings and pumping records and the captain's advices to the shipowner. With this knowledge, the captain and the shipowner knew the ship leaked in #3 lower hold and #2 lower hold where Iligan's cargo would be. They deliberately kept silent, failed to ascertain the cause and wilfully or through gross negligence destroyed the cargo.

Captain Dumble admitted that a ship with a known entry of water of unknown origin is unseaworthy (App. 285a). Mandle agreed (App. 383-4). Baumgartner said it was improper and unusual to send such a ship to sea (App. 295) and that the ship was unseaworthy for a trip to the Far East. (App. 264). Captain DeBouthillier agreed (App. 552a). See *The Sagamore*, (2 Cir.) 300 F. 701; 1924 AMC 961. There was little doubt in the minds of Mandle and Baumgartner that Captain Dumble, upon a simple reading of the log books, which he signed every day,

knew that his ship leaked (App. 146, 158, 335-338, 341, 345-6, 352, 256-7). One would "certainly want to pump it and observe readings of 15" and 13" (App. 336). Mandle could not account for high readings on the Madras voyage (App. 390). Where #3 is pumped much more than the other holds, that is indicative of a problem in #3 (App. 337) and Mandle would have ordered an investigation (App. 337). If he had examined the logs and noted the pumping and the readings in #3, he would have taken action (App. 341). Knowing the readings, the Captain "should consider that he has a considerable water entry". (App. 346). Mr. Mandle was there talking about the readings of 12" and 18" in the #3 port bilge while the Iligan cargo was being loaded at Baltimore (App. 344). He disagreed with Weyerhaeuser's counsel that this little bit of water was nothing. Mandle was Weyerhaeuser's operations manager (App. 319). He would have investigated the reason for recurring readings of water in the #3 port bilge in early June, 1966 (App. 336). To him, the 24" readings during the coastwise voyage meant there was water in the cargo (App. 339-340) and that is excessive water (App. 338). If he had known of the degree of water entry from Tampa to Cristobal, he'd have called in the American Bureau of Shipping and it is "definitely possible" that the cargo would have been removed from the ship (App. 349). It "obviously" should have been reported to the operations department (App. 350) Captain Dumble was "obviously aware" of log readings at Cristobal (App. 352).

Baumgartner the marine superintendent who had extensive experience with liberty ships (App. 222-3) was less truthful but he finally admitted that continuous pumping in one hold and not the others means a leak (App. 261). that the 18" at Baltimore should have been investigated (App. 293); and that this failure caused the cargo damage (App. 299) and that the 18" was caused by failure to

investigate the entry of water in #3 port bilge on the prior voyage. (App. 299-300).

Baumgartner would have investigated the continuous pumping (App. 246) but he didn't although logs are important to him (App. 251-2), and he read these entire logs (App. 255). One can find a leak in a particular hold by the amount of water being generated. (App. 255-6) and by the number of hours of pumping (App. 256) which he did check (App. 257).

Even the safety of the ship was compromised when #3 was flooded to a depth of 35" (App. 298-9). This was abnormal (App. 159-160, 311) and 40" is an indication of a "real" entry of water (App. 190).

Captain Dumble never ascertained until the vessel arrived at Moji the cause of the entry of water into #3 port.

The home office of Weyerhaeuser knew of the entry of water into the #3 port while the ship was still at Portland before the coastwise voyage. The Madras logbooks, deck and engine, were mailed from Madras or handed to Baumgartner in Portland (App. 108, 253-4, 323-4, 326, 328, 330-1). They were read by Baumgartner and Balkunas, the port engineer (App. 255, 257, 323, 328-9, 341).

If there is any doubt in this Court that the continuous pumping was of extreme significance, it should be noted that on the voyage after the valves were repaired while the ship sailed from the West Coast to the Far East, the bilges were pumped once in one month. (Pl. Ex. 30).

That the readings of these logs imparts knowledge of unusual and abnormal entry of water is clear from the testimony of Mandle and Baumgartner that Captain Dumble should have investigated and found the cause of the leak. (App. 287-8, 293, 299, 300, 335-8, 341, 345-6). And Captain Dumble was reprimanded by Mandle for his failure

to report the occurrence of entry of water during the Iligan voyage and the prior voyage (App. 389).

The Testimony of Captain De Bouthillier

Captain Alain de Bouthillier, with 30 years in high position in the shipping business (App. 71) testified as Iligan's expert. He swore that with #3 port bilge taking water as it was, the damage to the Iligan cargo was certain (App. 556a). The normal and expected pitching or movement fore and aft of a ship at sea, without any adverse weather, would not but cause water in any part of the #3 lower hold to penetrate forward through the non-watertight bulkhead into the #2 lower hold (App. 530a). He concluded, solely with reference to the logs, "that the vessel was experiencing a substantial and recurring problem with water entering the #3 hold from an unknown source" (App. 531a), that the problem began at least at the beginning of the Madras voyage; but was definitely apparent on August 3, 1966 as the ship arrived at Madras (App. 532a). Water continuously entered the #3 hold from August 5th to September 6th as evidenced by the almost continuous pumping on every watch, which was, in the words of Captain De Bouthillier, "a very unusual occurrence." (App. 532a)*

On October 13th, while the ship was sailing in a light condition and the log showing zero inches in the port and starboard bilges, the bridge ordered the #3 cargo hold bilges to be pumped (App. 533a). Captain De Bouthillier thought this very odd and proof of knowledge on the bridge of a continuing problem in #3 (App. 534a).

The log book for the coastwise voyage shows that the condition was getting not only "progressively worse but completely out of hand" (App. 535a).

From his experience and from his study of the documents, the expert witness had no doubt in his mind that

* In *McAllister Lighterage Line* v. *INA*, (2 Cir. 1957) 244 Fed 2d 867, 870, this Court holds: "A vessel which requires constant pumping at virtually the capacity of her pumps in order to keep afloat is not seaworthy".

Captain Dumble knew his ship leaked while it was in Baltimore (App. 538a). He had no doubt either that Harold Baumgartner and Mr. Balkunas having read the logs knew there was a problem on the Madras voyage (App. 539a, 540a).

The fact that the water kept recurring was the master fact in the expert's reasoning. (App. 540a, 541a).

It is agreed by all the witnesses, including Captain De Bouthillier (App. 543a), that the water entered the #2 and #3 common lower hold through a corroded and rusty port clapper valve, and to a lesser extent through the defective starboard clapper valve. The disc or clapper in the port valve had fallen from lugs which had rusted away (App. 365a) and was lying in the valve body in a deformed and bent condition. This allowed the sea to enter the valve itself. The water then entered the cargo compartment through a wastage hole on the bottom, through the plug, at the flange, from the top inspection plate; the valve was leaking generally (App. 628a).

The surveyors in the Far East found the starboard valve also leaking, with the disc off the lugs (App. 363). A cement box was built around it.

All witnesses agreed that the corrosion of the #3 port valve took place over a long period of time (App. 370a, 465a, 580a). It could not have begun during the Iligan voyage (App. 388, 370a, 380a, 421a, 288).

The captain, knowing the ship was leaking at Baltimore, and not knowing the cause, should not have loaded cargo into #2 and #3 lower hold. He should have seen that the owners rectified the situation (App. 553a, 554a) The same is true of Baumgartner, the marine superintendent and Balkunas, the port captain (App. 551a, 553a, 554a). The ship was in a known unseaworthy condition at Baltimore (App. 551a, 552a) and the damage to the Iligan cargo "would certainly result." (App. 556a).

There was no relevant cross-examination of Captain De Bouthillier and his testimony stands unrebutted. Captain William Wheeler, New York Navigation's marine expert, who was in Court throughout the whole trial, was not put under oath. The reason is obvious. See letter of Mr. DeOrchis dated July 11, 1972, attached hereto as Exhibit B.

An expert witness' unrebutted testimony may support the Court's findings. *U.S.* v. *Los Angeles Soap Co.* (9 Cir. 1936) 83 F. 2d 875, 888. See also The Yoro, 1952 AMC 1094, 1097.

The Defendants' Failure to Produce Meaningful Testimony Casts Doubt on All Their Allegations

Judge McLean was appalled that Weyerhaeuser failed to put in a case for defense or even to bring to the room of trial persons who could identify certain documents (App. 702a-703a). New York Navigation put on one pitiful surveyor who went into a black hold in Tampa with a flashlight and saw no evidence of leakage (App. 687a, 688a). He could not see into the bilge well (App. 675a).

The obvious inference is that the people who should have been called by appellees would have given testimony contrary to appellees' positions in this case.

If there be any doubt that Iligan has proved its entire case of gross negligence, wilful misconduct and breach of warranty, appellees' failure to produce witnesses with knowledge of these events will compel this Court to draw the proper inferences.

The Master's Cover-Up

Iligan need not prove that Weyerhaeuser knew the valves were leaking prior to the ship leaving Baltimore or that there was no other cause of leakage. It is enough that there was a known leak and the cause was unknown. All of Captain Dumble's explanations are irrelevant but, since

the lower Court thought his state of mind important, they will be referred to here.

Firstly, a Court ought not lightly hold that a Captain with 23 years experience was a fool and bumbling idiot, even if Captain Dumble solicited that fiinding under the circumstances.

To excuse his deliberate or gross failure to find and repair the corroded clapper valve, Captain Dumble said he thought the high readings and excessive pumping in #3 port was a fresh water back up when he took fresh water aboard and he tasted fresh water at Cristobal. But his marine superintendent told him in Portland a fresh water backup was not possible (App. 120-1, 148, 284, 369, 544a). The taste test at Cristobal was not only impossible or unfeasible, at best (App 541a), but it allegedly took place at Cristobal, long after the ship left Baltimore in a leaky condition and can have no bearing on his state of mind in Baltimore. Also he knew of the high reading at other times he didn't take on fresh water (App. 123-5, 159). There were no fresh water pipes or tanks in #3 (App. 109-110).

The Captain implied that fresh water may have entered only when he was taking it aboard and after the bilges were pumped, they were dry. It is incredible that he would believe this could account for recurringly high readings and continuous pumping for days on end when no fresh water was being taken aboard.

Weyerhaeuser's counsel have seized upon the captain's excuse that sweat from the lumber cargo caused the flooding of #3 on the coastwise voyage. This again is a red herring and could have been no serious element in the Captain's state of mind in Baltimore. When fresh water was dismissed as the cause on that voyage, the Captain next suggested that the salt water ballast tanks were leaking (App. 125). He discovered the sweat possibility (App. 129) but he admits anyway that 24" of water in #3 was unusual

(App. 128). Mandle said any water in the cargo is "excessive" (App. 338) and 24" is a lot of water and is to be investigated (App. 364). He would have taken action (App. 341). The operating engineer of Weyerhaeuser did not blame the lumber and neither did the marine superintendent. Captain De Bouthillier testified that sweat would not cause an appreciable increase in the bilges. (App. 619a).

Any argument by appellees that green lumber caused only #3 to flood comes with ill grace. They objected to prospective testimony by Mr. Paul Keeler (App. 701a) that green lumber gives off no water, because there was "nothing to rebut", App. 701a-703a).

Captain De Bouthillier thought little of all of these "explanations", (passim).

As for Captain Dumble overhearing a Coast Guard man talking to Mr. Baumgartner, it is amazing that Baumgartner did not mention this conversation although he was supposedly the person who was being spoken to. And Captain Dumble really did not want anyone to believe this story for he himself calls it hearsay (App. 189). Again at one time he refers to a Cmdr. Rohmberg (App. 90), and again as Lieut. Rynbergen. (App. 182, 189).

Also Weyerhaeuser did not produce this fictitious Coast Guard person or give evidence that he was not available nor did it offer his report.

The Captain first mentioned the possibility of a sounding cap not being replaced when it became clear that no fresh water was taken aboard on August 3, 1966 but the #3 port reading was 15" (App. 112). He then admitted the ship was in port, there was no weather on August 3rd, and no rain and the deck did not leak (App. 112-113) so the only thing that could go down an open sounding pipe would be air. He then said he did not know how the water entered the bilges. (App. 114).

Not once did the Captain mention the "snow" at Baltimore . That was a late discovery of appellees' counsel.

All this, when taken together with the fact that Liberty ships were "famous" for this particular problem (App. 554a-555a, 570a-571a, App. 127, 210), and the fact the Captain knew the #3 port showed more water when loaded than when the ship was light (App. 180, 372) is very indicative of his true state of mind and his true intent.

There is a clear evidence of guilt in Captain Dumble's deposition, a scienter which his frenetic efforts to conceal only highlight.

He reported to San Francisco by cable (undated, but a part of Weyerhaeuser's Exhibit 8) "Heavy weather damage #2 3 lower hold. . . .". His master's protest at Moji also blamed heavy weather (App. 169). But he testified that it wasn't really heavy weather (App. 169) and according to Baumgartner, the protest is not meant to be accurate.

His state of mind in Baltimore was simply that the cargo was less important than the ship's schedule or the budget for repairs (App. 227-8).

Captain Dumble was not a naive fool. He was an experienced Captain who knew what he was doing. He knew the Iligan cargo was going to be damaged, but he may not have known the hole in the valve would reach four inch proportions (App. 378) on the Iligan voyage and the Iligan cargo in the #2 lower hold would be reduced to junk.

All this would seem unnecessary since Judge Ward found most of the above facts to be true. But, since the question in this case is whether there is a concept called "gross negligence" some discussion of the facts and knowledge in Weyerhaeuser is obviously necessary.

Issues Presented for Review

1. Is Weyerhaeuser entitled to the package limitation (46 USCA §1304(5) where it knowingly stowed cargo into a hold where damage was certain to occur or where it should have known the damage was certain?

2. Does such conduct go to the root of the contract and thus amount to an unreasonable deviation?

3. Did Weyerhaeuser's conduct at or before Baltimore amount to gross negligence or wilful misconduct?

4. Did Weyerhaeuser's conduct at Cristobal amount to gross negligence or wilful misconduct?

5. Does the United States Carriage of Goods by Sea Act change the general admiralty law of the effect of gross negligence?

6. Is Weyerhaeuser estopped from denying that Iligan valued its cargo because the master kept silent on the unseaworthy condition of the ship?

7. Did Congress in the COGSA intend to grant a limitation to a tort feasor guilty of gross negligence or wilful misconduct?

8. If Congress did so intend, does that section of the COGSA violate Amendment V of the United States Constitution?

9. Does Weyerhaeuser have the benefit of §1304(5) of COGSA where it received no freight "in any event."

10. May Weyerhaeuser limit its liability to the value of the ship, plus pending freight?

11. Does COGSA apply by law to New York Navigation?

12. Does New York law bar any limitation by New York Navigation?

13. Did Iligan and New York Navigation contract for a limitation of liability?

14. Does a carrier have any duty to inspect if it has no knowledge of a defect in its ship?

15. Did New York Navigation exercise due diligence?

16. Does Clause 17 of the bill of lading provide for a limitation of $500.00 per customary freight unit?

17. Is Weyerhaeuser liable over to New York Navigation, including the latter's counsel fees?

Applicable Law

The United States Carriage of Goods by Sea Act, Title 46 U.S.C. §1300 *et seq.* applies, by law to the relations between Iligan and Weyerhaeuser. Especially relevant are Sections 1303(1) and 1304(5). Also applicable is the General Admiralty Law.

As to New York Navigation, the applicable law is the law of the State of New York, including the Uniform Commercial Code, McKinney's Laws of New York, and the General Admiralty Law (Common Law of the Sea.)

THE CASE AGAINST WEYERHAEUSER

POINT I

The Supreme Court mandates a judgment against Weyerhaeuser for full damages; these rulings are unaffected by the U.S. Carriage of Goods by Sea Act.

"Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness."

This is a direct quote from Mr. Justice Stone in *The Malcolm Baxter, Jr.*, 277 U.S. 323, 331 (1928), one of a line of cases, American and English, which mandate Weyerhaeuser's liability to Iligan without any limitation of liability to $500.00 per package.

The facts of most of these cases revolve about carriers who sent ships to sea in an unseaworthy condition, which condition caused (factually, if not legally, in every case) a deviation from the contract voyage.

The main issue was the justification for the deviation, which impelled a study of the circumstances surrounding

the initial unseaworthiness. If the deviation were not "caused" by the unseaworthiness it was then justified. Thus causation was determined by knowledge in the carrier sufficient for the Court to call his failure gross negligence or wilful misconduct.

The leading case is *Kish* v. *Taylor*, [1912] AC 604. The charterers, having failed to load a full cargo as required, the Master, to minimize the loss, loaded a deck cargo from other sources. He overloaded it so as to make the ship unseaworthy. As a result she was forced to deviate from her course in order to enter a port of refuge.

The shipowner sued the charterer for dead freight and the House of Lords held it was so entitled; that the deviation was not "caused" by the unseaworthiness and the charter was not nullified.

The Court holds on pp. 616-7:

> "Neither in *Street* v. *State Line Steamship Co.* (3) nor in *Gilroy, Son & Co.* v. *Price & Co.* (4) was it suggested that the breach of warranty of seaworthiness put an end to the contract of affreightment and relegated the shipowner to his rights as a common carrier by sea. *On the contrary, the observations of Lord Blackburn in the former case, printed at pp. 88 and 91 of the report, seem to indicate that the indorsee of the bill of lading might be disentitled to recover, despite the fact of unseaworthiness, unless that unseaworthiness caused the damage.* . . . And at p. 91 he says:
>
> 'I have no doubt what the result will be; it will be a question, . . . was this ship reasonably fit when she sailed to encounter the perils, and was the damage that happened a consequence of her being unfit, if she was unfit,' which appears to me to imply that *if the damage was not a consequence of this unfitness*, the shipowner's liability must be determined

by the provision of his contract of affreightment, so far as it dealt with that liability.

In *Baumvoll Manufactur von Scheibler* v. *Gilchest & Co.* (1) Lord Esher is reported to have used these words:

'The first cause of action that they allege is for breach of bills of lading, and secondly, they allege negligence in sending the ship to sea from New Orleans in an unseaworthy condition. It is not sufficient breach of a bill of lading that the ship went to sea in an unseaworthy condition; but *it must also be shewn that the unseaworthiness was the cause of loss.*" (Emphasis supplied).

This then is a causation case with the House concerned with not hampering the Captain's judgment when his ship is in peril.

The leading American case is *The Willdomino*, 272 U.S. 718 (1927) where a ship left port with a grossly inadequate supply of coal, known to be so by the carrier, which necessitated a departure from her course. During the deviation she struck a reef or a submerged object which caused water to enter the ship and damage her cargo. The Supreme Court held the shipowner liable as an "insurer", holding on p. 727:

"If, on the other hand, the vessel started from Ponta Delgrada with the intention of going to New York, the only emergency claimed to justify departure from the ordinary course and procedure to North Sydney *arose from wilful failure to take on sufficient coal.*

An emergency sufficient to excuse a departure cannot arise out of cirmumstances deliberately planned *nor from gross negligence.*" (Emphasis supplied).

Thus far then we see that the High Courts of two great maritime nations, reluctant to tie the Master's hands where deviation becomes necessary due to a sea peril, are not reluctant when the deviation is caused by unseaworthiness, which in turn is caused by the carrier's gross negligence. *Willdomino* holds that gross negligence will make a deviation voluntary and culpable.

It may be that foreseeability is an element of gross negligence. In the *Malcolm Baxter, Jr., supra*, a schooner developed leaks at sea from a cause existing at the port of departure which the *carrier failed to discover from a lack of due diligence.* This necessitated her putting into a port of refuge. While there an embargo frustrated the planned voyage. The Court held that the failure of the carrier to exercise due diligence to supply a seaworthy ship made it liable for all damages proximately caused thereby but the *bill of lading was not displaced because the carrier had no knowledge of the unseaworthiness* and, *therefore, the deviation was not voluntary* and as the deviation and not the unseaworthiness was the *causa proxima*, the bill of lading remained viable. The instant case, of course, has no intervening cause. The unseaworthiness itself was voluntary.

The unseaworthiness must be the cause of the loss. See *The Turret Crown*, (4 Cir. 1922) 284 Fed. 439, 444-5, where the Court cited the New York part of the case:

> "that the cause of the cargo damage was the water taken into the fuel tank through the bottom, and that *this was not caused by the unseaworthiness of the vessel.* . . . it would seem to follow, of course, that, there being no causal relation between the unseaworthiness and the damage, no advantage may properly be taken of the former." (Emphasis supplied).

See also *The Turret Crown*, (2 Cir. 1924) 297 Fed. 766; *Royal Ins. Co.* v. *U.S.* (2 Cir.) 87 F.2d 714; *The Waalhaven* (2 Cir. 1929) 36 F.2d 706, 708.

Appellees may find some comfort in *The Royal & Waalhaven* cases in that the carrier knew of the ship's unseaworthiness and yet the contract was held not to be displaced. Appellants suggest that these cases are consistent with its analysis of the law. In those cases there was knowledge of a defective steering apparatus and of old coal. Neither defect *must* cause adeviation or damage to cargo. The same is true of *Caledonier*, 2 Cir., 31 F. 2d 257, where the carrier had no knowledge he'd have to stop at Bermuda.

It is significant that in *Arkell & Douglas Inc.* v. *U.S.*, (2 Cir. 1926) 13 F.2d 555, from which the facts were stipulated for *Royal Ins. Co.* the Court held on p. 555 that:

> "the heating of bunker coal is not an unusual occurrence and is not dangerous, if the coal is readily accessible."

Weyerhaeuser here know hold #2 would flood. Judge Ward found that the Master knew of the water problem in holds 2 and 3 on the Madras voyage and that he reported this to Weyerhaeuser's marine superintendent in Portland after that voyage (App 37a). He also found that the shipowner knew of the excessive water entry (App 50a). The shipowner's supervisory officers knew it wasn't fresh water feed back or any other incredible explanation given by the Master (App. 121).

There is no difference in knowing that cargo damage is certain due to a known unseaworthy condition (App. 556a) and knowledge that a deviation is certain due to a known unseaworthy condition (Willdomino), Without an intervening deviation, the only question is whether Weyerhaeuser knew or should have known Iligan's cargo would suffer some water damage.

Weyerhaeuser was not just "taking a chance".*

* In a larger sense, every carrier who deviates from the contract is taking a chance with the shipper's property. Yet unreasonable deviation will displace the contract.

While Judge Cardoza in *May* v. *Hamburg, etc. Gessellschaft (the Isis)*, 290 U.S. 333, (1933), was discussing the exemptions of the Harter Act, the language and holding seem appropriate to these facts. On p. 348, he holds:

> *"A carrier who chooses for his own purposes to send out a crippled ship with needless enlargement of the perils of navigation will not receive exemption at the cost of the owners of the cargo if the perils thus enlarged have brought the ship upon the sands.* 'When the owner accepts cargo in an unseaworthy ship, though the defect be such as may be neutralized by care, he imposes on the shipper an added risk; not merely that his servants may fail, in so far as she is sound and fit, but that they may neglect those added precautions which her condition demands. That risk the statute does not impose upon the shipper; he bears no loss until the owner has done his best to remove all risks except those inevitable upon the seas'. Learned Hand, J., in *The Elkton*, 49 F. (2d) 700, 701."

Read *The Maine*, (S.D.N.Y. 1924) 8 F. 2d, 291, 293-4 for an excellent analysis of *The Turret Crown* and *Kish* cases.

To demonstrate the strength of Iligan's case, the Court is referred to *The Flying Clipper* (S.D.N.Y. 1953), 116 F. Supp. 386, where a deviation was held to have displaced the contract, and where the carrier certainly had no knowledge that cargo damage was certain. Iligan has proved the damage was inevitable and that Weyerhaeuser knew it.

There are two other cases which carry special emphasis in connection with this case. The first is *Oliver Straw Goods Corp.* v. *OSK* (2 Cir. 1931), 47 F. 2d 878. In that case, the carrier issued a bill of lading which falsely stated the goods were on board. As a matter of fact they were still ashore where they were stolen after an earthquake. A holder in due course of the bill was damaged. Judge A. Hand held on p. 879:

> "*. . . to effectuate the valuation clauses through the fiction of estoppel would be to enable the shipowner to profit by its own wrong.*"

The Court classed the breach of the on-board warranty as a deviation no less fundamental than a deviation in the voyage or on deck, etc., (p. 880).

Weyerhaeuser's gross negligence and its silence when confronted by Mr. Best are equally clear "breaches of warranty".

The Louise (D.C. Md. (1945), 58 F. Supp. 445 (J. Chesnut) was a case of gross failure to exercise due diligence. The Court held that the contract was displaced and ordered the carrier to return the prepaid freight on p. 448:

> "In the instant case I find that the unseaworthiness of the 'Louise' was the efficient cause of the damage and loss to the cargo owners. The argument to the contrary on behalf of the shipowners is based almost entirely on the case of *The Malcom Baxter, Jr.*, 227 U.S. 323, 48 S. Ct. 516, 72 L. Ed. 901.

On pp. 449-50, J. Chesnut continued:

> "In the Malcolm Baxter, Jr., the ship deviated from her prescribed voyage to enter a port of safety for repairs. While there the embargo was laid which frustrated the voyage. But under the facts of the case the master of the ship, on starting from port, had no reason to anticipate that a deviation would be necessary. The question was whether the ultimate loss to the cargo owners was legally due to the deviation necessitated by the development of the unseaworthiness, or by the embargo. The court held that the deviation was involuntary, and therefore the embargo was the effective cause of the frustration of the voyage. At page 331 of 277 U.S., at page 517 of 48 S. Ct. 72 L. Ed. 901, Justice (now Chief Justice) Stone said: 'Unseaworthiness alone, or devia-

tion caused by it, displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness (citing cases). In the *Willdomino* v. *Citro Chemical Co.*, 272 U.S. at page 727, 47 S. Ct. at page 262, 71 L. Ed. 491, it was said 'An emergency sufficient to excuse the departure cannot arise out of circumstances deliberately planned nor from gross negligence.' As previously stated, I find the unseaworthiness of the 'Louise' which forced her to return to Baltimore was due to the gross negligence of the shipowner. He obtained from the Coast Guard a license permitting the 'Louise' to sail after failing in good faith to make prescribed repairs. . . . The 'Louise' was flagrantly unseaworthy for her original voyage. Any reasonably careful and prudent owner must have known this. To permit the shipowner to receive and retain the prepaid freight under the circumstances here would be tantamuont to a fraud on the cargo owners. Under the facts of this case the return of the ship to Baltimore must be classed as a voluntary deviation; and the legally efficient cause of the breaking up of the voyage was her unseaworthiness and not the requisition of the ship."

a. The U.S. Carriage of Goods by Sea Act does not purport to change this law.

Section 1304(1) of the U.S. Carriage of Goods by Sea Act reads:

> "RIGHTS AND IMMUNITIES—Sec. 4.(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, . . ."

The corollary of this is simply that where the unseaworthiness is the result of a lack of due diligence the carrier shall be responsible.

But Congress is not saying that want of due diligence is the ultimate indignity which a carrier can inflict upon cargo. There is wilful damage; there is conversion; there is deviation; there is gross negligence. The Carriage of Goods by Sea Act mentions nothing of these except to define one example of unreasonable deviation.* If Congress meant to abolish carrier responsibility for these torts and breaches of contract, it would certainly not leave such a result for judicial interpretation or mere implication. Legislative abrogation of Common Law must be clear, specific and unambiguous.

Inasmuch therefore as Congress is silent on gross negligence and wilful disregard of cargo's safety, it was error for Judge Ward to consider the Carriage of Goods by Sea Act as in any way lessening the *Willdomino* doctrine. The conduct of the carrier has effectively rendered the Carriage of Goods by Sea Act of no effect in this case as the Harter Act, which also reduces the carrier's obligations to the duty to exercise due diligence, was of no significance in the *Willdomino* line of cases.

Another way of seeing this is to observe that if gross negligence is a circle, it encompasses within it a smaller circle which is a want of due diligence.

While it is quite true as Judge Ward observes, if the carrier exercises due diligence the ship will be seaworthy, yet it can be unseaworthy by reason of larger faults than lack of simple care.

Judge Ward seems impressed by the fact that no Court has yet had occasion to hold that knowledge of a serious defect will be more than want of due diligence. But the case of *Smith Hogg & Co. Ltd.* v. *Black Sea & Baltic General Insurance Company, Ltd.* [1940] A.C. 997 does just that. The charter party there used the Carriage of Goods by Sea Act language to hold the shipowner not liable for unsea-

* 46 USCA §1304(4).

worthiness" unless caused by want of due diligence". The House of Lords on p. 1001 held:

> "Hence the qualified exception of unseaworthiness does not protect the shopowner. In effect such an exception can only excuse against latent defects."

Due diligence simply means the *exercise of care to learn of a condition* which can be disclosed with investigation. The dichotomy often seen is a latent defect as opposed to an undisclosed defect; a latent defect being one which due diligence will not disclose.

When there is a *known defect* of serious proportions, such as a *continuous leak in one hold*, that is a different ballgame. Certainly it is not latent and certainly not to correct it is more than a lack of due diligence. *It is gross negligence, or wilful misconduct or a wilful disregard of the consequences.*

It is clear in many cases that this point was not raised. If plaintiff needs only a determination of lack of due diligence to make a full recovery, he would not argue as appellant here argues, that there are more culpable faults.

Judge Ward seems to hold that knowledge in the shipowner of an unusual entry of water into one hold of a ship and failure to correct it before sailing is mere lack of due diligence and not gross negligence but knowledge of the specific defect and a failure to correct it would be gross negligence.

Iligan suggests that the emphasis should be the other way. It seems that it would be safer to monitor and correct a specific defect at sea, but there are so many possible serious causes of water entry, that this Court should tell the shipping fraternity never to let a ship sail without knowing why she is leaking. Even with #3 full of fertilizer, the clapper value could have been plugged with a wooden plug from the outside by the ship's carpenter. But suppose the leak were coming from a cracked or paper-thin plate. This cannot be corrected at sea.

That Congress did not mean a carrier always has the package limit is clear in cases of deviation, in which case it does not have that unusual benefit. Similarily, as Congress did not go in detail into unreasonable deviation, but it still remained the law so, also, it saw no need to go into gross negligence, as it was understood that that law remained unchanged by any language in the Carriage of Goods by Sea Act.

Certainly a cargo owner who knows a hold is leaking, may refuse to load. Of course, if Congress meant to say he still must load or break his contract, though damage be certain, it must say so in clear language. For such a law would be derogatory of the Common Law and extreme, to say the least.

The decision below is a signal to ocean carriers not to seek specific knowledge of defects for they may lose their limitation of liability. It is a dangerous decision and should not be allowed to stand.

Failure to correct a known unseaworthy vessel is the zemith of corporate maritime irresponsibility. Let this Court, as it has always done in the past, set the standards by which businessmen must live, under the law.

Knowledge of an unseaworthy condition before a voyage raises an absolute duty to repair or not to undertake the voyage. This is not to be confused with an absolute warranty, for that doesn't depend upon any knowledge of a problem.

Weyerhaeuser's conduct comes within the definition of "wilful misconduct" for which conduct an airline loses the limitations of the Warsaw Convention. This circuit in *Grey* v. *American Airlines* (2 Cir. 1955), 227 F. 2d 282, cert den., 350 U.S. 989, defined that concept on p. 285 as follows:

> "There is no dispute as to what constitutes wilful misconduct. The instructions required proof of 'a conscious intent to do or omit doing an act

> from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct'. This was in accordance with precedent. [citation]".

For the same definition, see *American Airlines* v. *Ulen* (Ct/App. D.C. 1949) 186 F.2d 529 533 ("It covers . . . also acts of insouciance, without concern for the consequences."); *Pekelis* v. *Transcontinental & Western Air* (2 Cir., 1950) 187 F. 2d, 122, 124, 125; *Goepp* v. *American Overseas Airlines* (1952) 281 App. Div. 105, 117 NYS 2d 276, Aff'd. 305 NY 830, cert den. 346 U.S. 874; *Outlook Stores Inc.* v. *Cardinal Air Services* (1970 Civ. Ct. NY County) 317 NYS 2d, 37, 39.

For European Law on gross negligence in admiralty see *French State (Direction of Maritime Transp.)* v. *Boyer*, Ct. App., Rouen (6/7/55) Translation of opinion attached hereto as Exhibit C.

Iligan argues that there is a concept in admiralty law of gross negligence; that it is the same as wilful conduct and it renders the carrier liable for all the direct damage it causes; *that if this carrier is not guilty of gross negligence, then there is no such thing.*

b. Weyerhaeuser is liable in full "as for a deviation"

Judge Ward stated that Iligan accepted the risk that the carrier would not exercise due diligence (App. 48a). In today's world, one is not surprised by this comment.

But Iligan did not accept the risk that the carrier would disregard a known progressive leak in the very hold to be employed for cargo worth $2,600,000.00; that on the preceding voyage the water in that hold *alone* had gone 6 inches over the bilges; that the Master could shake hands with Iligan's representative on the bridge of the ship in Baltimore and remain silent about the leak. (App. 117a, 118a).

These risks are not acceptable. If Iligan had learned that the ship leaked it would not have loaded its cargo until it was fixed (App. 122a); it would at least have valued the bill of lading.*

If, as is surely the fact, Iligan did not anticipate inevitable damage to its cargo, then Weyerhaeuser's conduct increased the risk and is an unreasonable deviation, in the modern sense of the term.

This Court has recently summarized the law in this Circuit in *The Mormacvega*, (2 Cir., 1974) 493 F. 2d 97, 101, as follows:

> "While the concept of deviation originally applied to unjustifiable changes of route, American courts long have held that any carrier 'misconduct' which amounts to a material breach of the contract of carriage constitutes a 'deviation'. The consequences to the carrier were the same as in the case of a change of route. See, e.g., *Propeller Niagara* v. *Cordes*, 62 U.S. 7, 24 (1858). See generally Prosecution of the Voyage, 45 Tul. L. Rev. 807 (1971); Gilmore & Black, The Law of Admiralty §§ 3-40, 3-42, at 156, 159-60 (1957)."

This holding is in accord with the latest ruling by the House of Lords in *Suisse Atlantique* v. *N.V. Rotterdamsche*, 1966 LLR Vol. 1, p. 529. It was there held at p. 540:

> "Although the terms are sometimes used as if their meaning was the same, a fundamental breach differs from a breach of a fundamental term. In *Smeaton Hanscomb & Co., Ltd.* v. *Sassoon I. Setty, Son & Co.* (No. 1), [1953] 1 W.L.R., at p. 1470,[9] Mr. Justice Devlin said that he thought a fundamental term was
>
> > . . . something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates. . . .

* This "simple expedient" probably doubles the freight rate.

> In relation to a fundamental breach, one has to have regard to the character of the breach and determine whether in consequence of it the performance of the contract becomes something totally different from that which the contract contemplates."

Judge Ward's statement of the issue in this case (App. 47a) would be accurate, therefore, if the phrase "even though it follows the contract route" would be replaced by "even though it knows hold #2 will leak."

The background for the modern view that "a deviation is no more than a breach of the contract of carriage" (Judge L. Hand in *Farr* v. *Hain SS Co.*, 2 Cir., 1941, 121 Fed. 2d 940, 944) is illustrated by *The Indrapura*, (D.C., Ore. 1909) 171 Fed. 929 (unnecesarily entering a drydock with cargo on board); *St. John N.F. Shipping Corp.* v. *Companhia Geral* (1923) 263 U S 119 (stowing cargo on-deck with an under-deck bill of lading; *Charbonnier* v. *U.S.*, (D.C. So. Car. 1929) 45 Fed 2d 166, aff'd., (4 Cir., 1930) 45 Fed 2d 174 (towage without cause); *Calderon* v. *Atlas SS Co.*, (S.D., N.Y. 1894) 64 Fed. 874, aff'd (2 Cir., 1895) 69 Fed. 574, aff'd., (1898) 170 U.S. 272 (overcarriage); *The Citta di Messina*, (S.D.N.Y. 1909) 169 Fed 472 (delay);

In *Woodward Stores Ltd.* v. *The Canadian Star* (Canada, Exchequer Court) 1970 LLR Vol. 2, p. 86, the Court held on p. 91:

> "2. On the law, as there the learned Judge cited *J. Spurling Ltd.* v. *Bradshaw*, [1956] 1 Lloyd's Rep. 392; [1956] 2 A11 E.R. 121, where Lord Denning said in part, on pp. 396 and 124 of the respective reports:
>
> '* * * If he stores them in a different place, or if he consumes or destroys them instead of storing them, or if he sells them, or delivered them without excuse to somebody else, he is guilty of a breach

which goes to the root of the contract and he cannot rely on the exempting clause * * *' "

The authorities then are clear that a serious breach of contract by the carrier displaces that contract and makes the carrier an insurer of the safety of the cargo. That is to say, exculpatory, as well as limitation and valuation clauses, all of which might otherwise be valid, are no longer a part of the contract.

Have these defendants deviated from this contract? Plaintiffs submit that it can be fairly inferred that the intent of the parties was that the seawater was to be on the outside of the ship and plaintiffs cargo was to remain dry on the inside of the ship. It is not necessary to spell this out in a contract of carriage.* On the voyage in question, the numbers 2 and 3 common lower holds of the SS "John Weyerhaeuser" suffered an ingress of seawater (some 14 feet) but not through simple negligence or as a result of a failure to exercise due diligence. Weyerhaeuser *knew* before plaintiffs' cargo was loaded and before the bill of lading was issued, *that a substantial quantity of water would enter the number 2 hold.* This proposition cannot be disputed for Weyerhaeuser *knew* that on the two previous voyages of the same vessel, substantial quantities of water entered the common hold and *knew* too that nothing was done to remedy the condition. As noted earlier, carriage of cargo on deck in violation of a contract calling for under deck stowage is a deviation which strips a carrier of the limitations of liability otherwise provided for by statute or contract. *The Hong Kong Producer* (2 Cir., 1969) 422 Fed 2d 7; *The Flying Clipper, supra.* Yet it is ironic that in the case at bar, plaintiffs' cargo would have safely survived "on deck" carriage (as did other of plaintiffs' cargo) but did not and could not have survived this under deck carriage. It would be cynical to contend in that one deviation (i.e., on deck), the results of which are less

* The carrier's duty under the Common Law and COGSA is to carry the cargo safely.

onerous would carry a greater penalty than another deviation (i.e., stowage in a flooded hold) the results of which were far more serious.

Judge Ward's decision that Weyerhaeuser's conduct is not an unreasonable breach of contract because it did not know the "exact" cause of the abnormal water entry is to turn the clock back to a time when decisions were seriously decided on such technical grounds.

As far back as 1909, the Court in *The Indrapura, supra* at pp. 931-2 held:

> ". . . ; but it [the term, deviation] seems now to comprehend in general every conduct of a ship or vehicle used in Commerce tending to vary or increase the risk incident to a shipment."

This is the law and Weyerhaeuser did vary and increase the risk voluntarily.

But if it be true that it did not know that cargo damage was certain, nevertheless.

POINT II

Weyerhaeuser is liable for full damages if it should have known that cargo damage would result.

In *The Malcolm Baxter, Jr., supra,* at p. 334, the Supreme Court states:

> "There is no finding, nor is it suggested, that at the time when the contract of affreightment was entered into, or when the vessel broke ground, the embargo could reasonably have been foreseen, or that there were any special circumstances charging petitioners with the knowledge or expectation that the unseaworthiness or consequent delay would bring the vessel within its operation."

The Malcolm Baxter, Jr. and the above quote are discussed extensively by the House of Lords in *Monarch SS Co.*

Ltd. v. *Karlshamus Oljefabriker* (A/B) [1949] A.C. 196. In that case plaintiff chartered defendant's British vessel to carry soybeans from Manchuria to Sweden. Because of delay caused by unseaworthiness, the vessel was at sea when war broke out between England and Germany. The ship came under Admiralty orders and had to discharge the cargo at Glasgow. Plaintiff sued for the cost of transshipment on a neutral vessel and defendant defended on the basis of a war risk clause in the charter party.

The House of Lords, with due respect for the decision of the Supreme Court of the United States, found *The Malcolm Baxter, Jr.* rightly decided, but held it had left open the question whether, if the carrier in that case *should have foreseen* the embargo, it would have lost its exemptions.

The House held that the shipowner should have foreseen the outbreak of war and the resulting diversion. The war risk clause was therefore null and void.

Under this holding and under the open question in *The Malcolm Baxter, Jr.*, Weyerhaeuser will have lost its limitations if it should have known, from the facts within its knowledge, that the cargo might be damaged.

It is important that in *Monarch*, the ship did not even have actual knowledge of unseaworthiness but it was merely negligent.

The *Monarch* holding, which extends further the line of cases starting with *Kish, supra*, is in agreement with the holding of this Circuit in *The Pocone*, (2 Cir. 1947) 159 Fed 2d 661, cert den (1947) 331 US 836.

In finding privity in the shipowner sufficient to find liability for a fire, Judge L. Hand held on pp. 664-5:

> "The measure in such cases is not what the owner knows, but what he is charged with finding out".

If what should have been known can possibly support a deviation ruling in the Supreme Court and has actually

been so held by the House of Lords and can support privity, and design and neglect, for fire and limitation cases, it should be enough to hold Weyerhaeuser liable without limitation in this case.

POINT III

Because they concealed from plaintiffs the unseaworthy condition of the ship, defendants are equitably estopped from relying upon their contract.

Mr. Jay Best, Iligan's representative for this movement, spoke to the Master in Baltimore. Each man knew who the other one was (App. 117a, 118a) yet the Master who knew Iligan's cargo was being loaded into Hold #2, and that the water was already to the rim of the bilges and had been entering that common hold for four months, did not tell Mr. Best. (App. 117a, 118a).

If Best had been told, he would not have loaded until the problem had been repaired. At least, he would have valued the cargo* and thus made the recovery match the risk.

Weyerhaeuser concealed the "leaky" condition of the ship from Iligan by remaining silent when it clearly had a duty to speak. This conduct is an affirmative reaffirmation of the tightness of the ship. Iligan in reliance upon this material misrepresentation, performed its obligations under the contract i.e., it delivered the cargo to the vessel, accepted a bill of lading as a receipt therefor, and paid the freight charges as agreed. It would be manifestly inequitable to now permit the carrier, who has fraudulently induced Iligan's performance of the contract to rely upon terms of that contract in defeating its recovery. To put it succinctly, the carrier in such a situation is estopped from asserting the contract of carriage in its defense.

* This is an often demanded procedure by this Court to avoid "package" questions in cargo cases.

The Sarnia (2 Cir.) 278 Fed. 459, 463-66, is directly in point. This Court there held:

> "If carrying above deck goods which should have been carried below deck vitiates the policy of insurance, as between the insurer and insured, we see no reason why, for like reasons as between the carrier and the shipper, a like breach of the contract of carriage should not vitiate the valuation clause; *for the shipper, in fixing the amount in such a clause takes under consideration the risk to which his goods are to be exposed and the manner of their carriage.* The fact that the goods are to be carried below deck is understood between the parties, and is as much a part of the valuation clause as it is of any other of the clauses in the bill of lading. It seems to us most unreasonable to hold that, as between the shipper and the carrier, the former should be estopped by a valuation clause, where the later's own misconduct has breached the agreement and destroyed the conditions upon which the estimate of value was predicated. In fixing the value the shipper was undoubtedly influenced by the fact that the goods were to be carried below decks, and not exposed to the perils of carriage above deck."

In the case of *Olivier Straw Goods* v. *O.S.K.*, *supra*, the carrier was similarly estopped from asserting language in the contract of carriage to defeat the cargo owner's claim.

Logic impels the result that value and limitation provisions are of no force and effect when a contract of carriage is secured by deceit. It may be argued though that there is no evidence of intent to deceive, yet intent may be established by circumstantial evidence and inferences deducted from all the facts and circumstances.

Nevertheless, plaintiffs agree with J. Weinfeld in *The Flying Clipper supra*, at pp. 389, 90 wherein he says that

it is not necessary to base the voiding of the contract upon a "gross" violation of its terms, or upon "misconduct" or because it "would work a fraud" or because the cargo was "converted". In the words of J. Weinfeld—"It is sufficient that the carrier's voluntary action in unjustifiably deviating so changed the essence of the agreement as to effect its abrogation."

POINT IV

Weyerhaeuser's failure to act at Cristobal was an independent act of gross negligence.

By the time the John Weyerhaeuser broke ground at Cristobal after a 15 day stop for engine repairs, the water had been reported to the Master to be six feet in Hold #3 (App. 164). On the way from Tampa, where 7000 tons of fertilizer had put the clapper valve under water, the port bilge readings for #3 were 25″ on 12/24; 30″ on 12/25; 24″ and 27″ on 12/26; 35″ on 12/27; 38″ on 12/29 (App. 81), on which day she arrived at Cristobal. She stayed at Cristobal for 15 days, during which time the soundings for #3 port bilge reached on different days, 18″, 24″, 26″ and 30″ (App. 81-82).

The bilge well is 18″ high, so any water over that is in the cargo.

It was fertilizer in #3 and Judge Ward has found that the water slowly permeated the fertilizer, formed a slurry and burst through the wooden bulkhead enroute to Moji. (App. 34a).

Judge Ward found Capt. Dumble's story of the "taste test" at Cristobal implausible so at least it appears he finds that the Master had actual knowledge at Cristobal that it was seawater that was entering Hold #3.

Yet, nothing was done there to protect Iligan's cargo. Since it had not yet been damaged, it could have been discharged from the ship. This is what Mr. Mandle testified might have been ordered by the American Bureau of Shipping.

Under all of the circumstances and with what the Master knew since August of 1966, the failure in January of 1967 to act, cannot be mere lack of due diligence, but can only be a gross violation of the duty to minimize the loss or as *Carver*, Carriage of Goods by Sea puts it on p. 113, "to prevent the spread of the mischief."

POINT V

If § 1304(5) of the Cogsa be interpreted to grant a limitation to wilful tort feasor, or one who is grossly negligent it contravenes Amendment V of the U.S. Constitution by taking Iligan's property without due process of law and denying it the equal protection of the laws.

The determination of the denial of due process in a particular case does not turn on the abstract of the Constitutionality of the COGSA or any of its sections. The true question is whether the facts in the case including the statute as interpreted, amount to such a denial. This idea of scrutinizing particular facts to determine whether there has been a due process violation follows the rule set down by the Supreme Court in *Betts* v. *Brady*, (1942) 316 U.S. 455, 462. There the Court held:

> "Asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness shocking to the universal sense of justice may, in other circumstances and in the light of other consideration, fall short of such denial".

Likewise in *Nebbia* v. *N. Y.*, (1934) 291 U.S. 502, 525, 537, the Supreme Court held:

> ". . . a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances because the reasonableness of each regulation depends upon the relevant facts."

Therefore, the consideration whether due process may be denied in this case does not turn upon the question of

COGSA's constitutionality but upon whether the circumstances under consideration show such a denial. Nor does it turn upon the apparent plain and unambiguous statutory language. For, a statute, though plain and unambiguous on its face, may, when applied violate due process of law. *U.S.* v. *Spector* (1952) 343 U.S. 169, 171.

The important consideration in this case is not that the package limitation deprives Iligan of 95% of it's loss, for Iligan admits that were this a simple case of negligence based upon ignorance or upon lack of due diligence where there was no indication of particular trouble, Section 1304(5) is perfectly valid and would be applicable and constitutional. But where Weyerhaeuser is guilty of *gross negligence* or *wilful misconduct* based upon *prior knowledge of serious defects* which had to damage Iligan's cargo, the granting to appellee a 95% limitation of liability or even a 5% limitation of liability constitutes a denial of fundamental fairness, shocking to the universal sense of justice. This violates the Fifth Amendment.

In *Nebbia, supra,* at p. 525, the Court held:

> ". . . the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable . . . and that the means selected shall have a real and substantial relation to the object sought to be obtained."

As set forth in the *Flying Clipper,* supra, at p. 388, the purpose of §1304(5):

> ". . . was to prevent a stipulated value for cargo in a lesser amount and to do away with the then current limits imposed by carriers, usually $100 or even a smaller sum."

The purpose then was to increase the minimum allowable limitation and was passed for the benefit of cargo. To interpret it now to benefit a grossly negligent or wilful tort feasor (deviator) would be to say that Congress has selected a means which has no real relation to the object sought to be obtained.

If we go further and consider the object in the first instance of allowing any limitation of liability to a carrier, we see that it is to benefit what was an ailing Merchant Marine or to see that carriers would not be liable for loss of small packages of great value. The *SS San Diego*, (2 Cir. 1945) 148 F. 2d 141, or as recently interpreted, to put a limit on liability for negligence for insurance purposes. Any one or all of these purposes may be valid, but none of them are advanced by granting a limitation under the facts of this case.

It may be a public purpose to grant a negligent carrier a limitation, and even looking at that in the best light, it is a harsh rule that taxes a private cargo owner for that public purpose and not the general public. Yet, that may be constitutional.

But to grant limitation under § 4 (5) to a carrier who sent Iligan's cargo to destruction (perhaps relying on §4 (5)), would be basically unfair and would violate due process. It is taxation of an individual for the benefit of another individual without any valid public purpose. It, therefore, also denies Iligan the equal protection of the laws.

Any doubts in this respect should be resolved in favor of the security of person and property. The concept of equal protection is embraced within Amendment V; thus the Federal Government as well as the States, is not allowed to pass legislation which makes arbitrary classifications.

POINT VI

The limitation under Bill of Lading Clause 17 is $500.00 per customary freight unit.

Clause 17 of the bill of lading displaces §1304(5) of COGSA; if it applies at all, it affords Weyerhaeuser a limitation of $500.00 per customary freight unit. Iligan confidently expects that this Court will never reach this question because the carrier ought not have any limitations for

its gross negligence and deviation. However, *if there is a limitation in this case, it is $500.00 per "customary freight unit" and not per "package."*

Clause 17 of the bill of lading reads, in part:

> "In case of any loss or damage to or in connection with goods exceeding in actual value $500 lawful money of the United States, per package, or in case of goods not shipped in packages per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted *and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit,* or pro rata in case of partial loss or damage unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the Carrier and inserted in this bill of lading and extra freight paid if required and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed to be the declared value and the Carrier's liability, if any, shall not exceed the declared value and any partial loss or damage shall be adjusted pro rata on the basis of such declared value." (emphasis supplied)

This is an increase in carrier's liability from that granted by §1304(5). That section reads:

> "(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been de-

> cleared by the shipper before shipment and inserted in the bill of lading."

The limitation under §1304(5) requires a determination whether or not the damaged property was a "package," because it says "or in case of goods not shipped in packages, per customary freight unit . . .". Clause 17, on the other hand gives the cargo owner a choice of $500 per package or $500 per customary freight unit. The language is;

> ". . . and the carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit. . . ."

This is the limitation phrase; the first sentence is simply the "triggering" phrase, which puts Clause 17 into operation.

Since Clause 17 is phrased as an option and the carrier has not reserved that option to itself, obviously the shipper must have the option. It will choose that which gives it the higher limitation, i.e., $500 per customary freight unit.

"Customary freight unit" means "*the unit of the cargo customarily used as the basis for the calculation of the freight rate to be charged*". *General Motors Corp.* v. *Moore-McCormack Lines, Inc.* (2 Cir. 1971) 451 F. 2d 24, 25.

Clauses such as Clause 17 are strictly construed against the carrier who prepares them, *Calderon* v. *Atlas SS Co.* (1898) 170 U.S. 272.

The COGSA itself in §1304(6) authorizes the carrier to increase its liabilities and in this case it has done so.

Judge Ward's reliance on clause (1) of the B/L that nothing therein can be construed to increase the carrier's liability (App. 51a) cannot affect a specific increase is error. It is also contrary to his ruling that the same clause in the charter party was ineffective (App. 59a).

THE CASE AGAINST NEW YORK NAVIGATION

POINT VII

The U. S. Carriage of Goods by Sea Act does not apply *ex proprio vigore* to the relations between Iligan and New York Navigation; nor did the parties incorporate it for that purpose.

New York Navigation took great pains to convince the Court that it did nothing (App. 772a). It repeated that fact several times. On its cross-examination of Mr. Mandle, it specifically emphazied that its on-hire surveyor did not so much as look at the clapper value (Mandle 60). Clearly then, New York Navigation did not exercise due diligence to supply a seaworthy ship. Its failure in this respect is relevant, however, only if COGSA, specifically § 1303 (1) (a) thereof, applies to its contract.

Since the July 11th Agreement required that New York Navigation provide "seaworthy" vessels, and the law implied a warranty as of the time of sailing, the issue as to which document survives as "evidence" of the contract of carriage, i.e., the Agreement, or the bill of lading (App. 35), must be resolved. If it were the Agreement, then New York Navigation had to be held to two warranties of seaworthiness. If it were the bill of lading, then New York Navigation would be held to the obligation to exercise due diligence.

Iligan has set forth, supra, the relevant provisions of COGSA and the Agreement.

The Act applies by law to a "bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea . . . in foreign trade . . .".

It is not disputed that this case is concerned with the carriage of goods by sea in foreign trade as defined by Sec. 1312. However, the character of the bill of lading issued and delivered to Iligan is not such that qualifies it as "evidence of a contract for the carriage of goods by sea" (Sec. 1300), to which the Act applies. Long before

Iligan's cargo was loaded upon Weyerhaeuser's unseaworthy vessel, and long before a bill of lading acknowledging receipt thereof was issued and delivered to Iligan, Iligan entered into an agreement for the transportation of its cargo with New York Navigation. The existence of two writings understandably prompts an inquiry into which the of the two is "evidence" of the contract of carriage. If the bill of lading replaces the earlier agreement then it is "evidence" of the contract of carriage and the terms and conditions of the Act are mandated by statute. If, on the other hand, the prior written agreement survives the issuance of the bill of lading, then it is the prior written agreement which is "evidence" of contract and since it is neither "a bill of lading" nor a "similar document of title" the terms and conditions of the COGSA are not mandated by that Act. The prior written agreement (hereinafter referred to as the AGREEMENT) which is dated July 11th, 1966 and consists of some twelve type-written pages provides in part at Clause (11):

> "In all other respects the loading and transportation herein shall be performed in accordance with NY NAV's standard bill of lading, copy of which is appended to this Agreement."

It continues further in the same clause:

> "In the event any clause in such bill of lading is inconsistent with any part of this Agreement, the Agreement shall be controlling."

It is clear then that not only does the prior written agreement survive the issuance of the bill of lading, but it overrides any inconsistent clauses in the bill of lading. It, therefore, must be viewed as the "evidence" of the contract of carriage. Accordingly, the Act does not apply to this transportation *ex proprio vigore*. Should any doubt as to the character of the bill of lading remain, however, Iligan respectfully reminds this Court that long ago it was decided that in a case where a bill of lading is issued to one who is both shipper of the cargo and charterer of

the vessel, such bill of lading, in the hands of the shipper/charterer is but a receipt, which cannot vary the terms of the charter party. *The Fri.* (2 Cir. 1907) 154 F. 333, 336. This proposition was recently reiterated by the Second Circuit. *The Marine Sulphur Queen* (2 Cir. 1972) 460 Fed. 2d 89 cert. den. (1972) 409 U.S. 982; see also Poor, *Charter Parties and Ocean Bills of Lading*, (5 Ed. 1968) Sec. 25. A bill of lading issued to the charterer only becomes a "contract of carriage" from the moment at which such bill of lading regulates the relations between a carrier and a holder of the same. e.g., when it is transferred to a buyer of the goods. Carver, Supra, p. 219. This bill of lading was non-negotiable; there was no buyer of the steel mill and no "holder" of the bill of lading save Iligan (the sub-charterer).

The essence of a charter party is that the charterer employs the entire ship or a substantial portion of it for a particular voyage or a particular portion of time. *Jefferson Chemical Company* v. *M/T Grena* (5 Cir. 1969) 413 F 2d 864, 867; citing, Gilmore & Black, *The Law of Admiralty*, Sec. 4-1; Carver, *Carriage of Goods By Sea*, 169 (6th Ed.); Poor, *Charter Parties and Ocean Bills of Lading*, Sec. 1 (3rd. Ed.). It cannot be disputed that Iligan pursuant to the Agreement employed a substantial portion of the S.S. John Weyerhaeuser for the carriage of its cargo on the voyage from Baltimore to Iligan. It follows then that the document executed by the parties is a charter party, the terms of which could not be altered by the subsequent issuance of the bill of lading. One cannot but inalterably conclude again therefore that the bill of lading did not evidence the contract of carriage, in consequence of which COGSA is not mandated as governing the rights and liabilities of Iligan and New York Navigation.

COGSA also does not apply of its own force to New York Navigation because that company was not a carrier as set forth in the Act.

The Court below agreed with all of this, but held that New York Navigation had effectively incorporated COGSA

and thus had reduced its implied warranty to a duty to exercise due diligence and had limited its liability under its express warranty to $500.00 per package.

Having demonstrated Cogsa's inapplicability as a statute to this controversy we shall now turn to a consideration of its effect as incorporated by reference by virtue of clause 1 of the bill of lading. Since the vehicle for the incorporation of Cogsa is the bill of lading, Cogsa cannot vary the terms of the AGREEMENT, e.g., the express warranty of seaworthiness in clause 1 of the latter overrides the warranty of due diligence w th respect to seaworthiness found in Section 1303 of the former.

Reference to the bill of lading (clause 1) discloses that ". . . nothnig herein contained (i.e. in the bill of lading) shall be deemed a surrender by the 'Carrier' of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act (Cogsa)". Prior to evaluating any effect Cogsa may have, one must first define "Carrier" as referred to in clause 1. In clause 2 of the same instrument the word "Carrier" is defined as including ". . . the ship, her owner, master, operator, demise charterer, and *if bound hereby* the time charterer, and any substituted carrier, whether the owner, operator, charterer, or master shall be acting as carrier or bailee.". Obviously, Weyerhaeuser is a "Carrier" if only for the reason that it was the "owner" of the S.S. John Weyerhaeuser. Surprisingly, New York Navigation is not a "Carrier" for it is neither "ship" nor "owner", "master", "operator", "demise charterer" or "time charterer" of the S.S. John Weyerhaeuser. It is not therefore afforded any protection by Cogsa. For that matter it is not even afforded the protection of clause 17 of the bill of lading which permits the "Carrier" to limit its liability to $500.00 per package or per customary freight unit. Having failed to save unto itself the protection of Cogsa or the bill of lading provision, New York Navigation Company, Inc. can only fall back upon the AGREEMENT which it signed on July 11, 1966.* That document does not grant it any limitation of liability.

* Incorporation of Cogsa is redundant when compared with the exceptions in clause (15) of the AGREEMENT.

In fact New York Navigation can't be the carrier. The Carriage of Goods by Sea Act requires the carrier to exercise due diligence to make the ship seaworthy; properly man, equip and supply the ship; make the holds . . . and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation. It also requires the carrier to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

As a simple voyage charterer, New York Navigation had no power to do these things. Congress would not require a party to do the impossible.

The Court in *Southern Block & Pipe Corp.* v. *M/V Adonis* (Ed. Va. 1970) 1972 AMC 1525, 1531 holds:

> "The 'carrier' is defined (46 U.S. Code, sec. 1301) as: '(a) the term 'carrier' includes the owner or charter who enters into the contract of carriage with a shipper'. In the case at bar, the carrier is the M/V *Adonis*. The 'charterer', as used in 46 U.S. Code, sec. 1301(a), would be a bareboat charterer or a charterer under a complete demise who stood in the place of the owner and not the voyage charterer, Sparti. This is manifestly clear since in 46 U.S. Code, sec. 1303, the carrier who must '(a) make the ship seaworthy***' is the same carrier who must under section 1303(b), properly man the ship. In the charter in the case at bar, the owner of the vessel maintained complete control of its manning, equipping, and supply and is manifestly the 'carrier' as envisaged under the Cariage of Goods by Sea Act.

In *Milos Zajicek* v. *United Fruit Co.*, (5 Cir. 1972) 1972 AMC 1746, 1756, Judge John R. Brown holds:

> "That knocks out its $500.00 per package limitation since this is statutory/contractual Limitation available only to a carrier as defined in COGSA and does not extend to stevedores, or here, forwarders, service or warehouse persons. *Herd & Co.* v. *Krawill Ma-*

chinery Corp. (1959), 359 U.S. 297, 1959 A.M.C. 879"

This Court has held in *The Sea Star* (2 Cir. 1972) 461 Fed 2d 1009, 1972 AMC 1440, 1446 that:

> "COGSA, Section 1301(a) defines 'carrier' as the 'owner or the charterer who enters into a contract with a shipper.' According to Section 1301(b), a bill of lading is a contract of carriage. Because World Bulk's agent, Representaciones, signed the bills of lading, World Bulk is the COGSA carrier."

It is admitted by New York Navigation's counsel, its bill of lading was designed to bind only the shipowner as carrier. All of its language and the *demise clause* (clause 1) as well as the fact that New York Navigation signed it *only* as agent for Weyerhaeuser, make it clear *beyond cavil*, that New York Navigation meant to have no responsibilities under that paper. Not having any duties under it, it cannot, therefore, be the "contract of carriage" (46 USCA Sec. 130 (b)). It never regulated the relations between Iligan and New York Navigation, but was merely a receipt. It was non-negotiable and, therefore, never became more than a receipt in the hands of Iligan. See *Carver*, supra at p. 886. Nothing could be clearer than New York Navigation's own "demise" clause which reads:

> "If the ship is not owned by or chartered by demise to the Company designated herein (as may be the case notwithstanding anything that appears to the contrary) this bill of lading shall take effect only as a contract with the owner or demise charterer, as the case may be, as principal, made through the agency of the Company designated herein which acts as agent only and shall be under no personal liability whatsoever in respect thereof."

The July 11th Agreement was to prevail in case of inconsistency with the bill of lading. This gives some meaning to the latter paper, but simply as an adjunct to the main contract. This then was a case of dual contracts, New York Navigation being bound by the July 11th

Agreement and any clauses of the bill of lading not inconsistent there with which apply to it and Weyerhaeuser being bound by the bill of lading.

See the discussion of dual contracts in Carver, *supra* p. 359 and demise clauses on p. 360.

POINT VIII

Even if COGSA were incorporated it has no effect on the warranties.

The July 11th Agreement contains two warranties by New York Navigation to supply a seaworthy ship.

I

One, contained in clause (1) is an express promise to "provide" suitable and seaworthy ships. Since this is a contractual warranty it can be contractually reduced but, in this case, it wasn't. Since Clause (11) says "*In all other respects* the loading and transportation herein shall be *performed* in accordance with New York Navigation's standard bill of lading", then, even if New York Navigation were the carrier and entitled to the provisions of the bill of lading, that paper cannot vary the express warranty. It should be noted that this doesn't say the bill of lading shall govern limitations.

Certainly the further stipulation that New York Navigation need only exercise due diligence is inconsistent with the express promise to supply a seaworthy ship.

The breach of this warranty is clear and it was so found by Judge Ward, but he also found that New York Navigation had the benefit of the Carriage of Goods by Sea Act's package limitation. Iligan for reasons set forth above argues that the parties did not intend that New York Navigation should have any such limitation.

The express warranty to "provide" seaworthy ships took effect on December 11, 1966 when the ship was made available for Iligan's cargo.

II

It would have no effect on the implied warranty that the ship was seaworthy *when she sailed* on December 16, 1966. *Carver*, supra, pp. 305-6.

As was held by the Supreme Court in *Cullen Fuel Co.* v. *Hedger Co.* (1933) 290 US 82, 88:

> "The warranty of seaworthiness is implied from the circumstances of the parties and the subject matter of the contract and may be negatived only by express covenant. It is as much a part of the contract as any express stipulation."

And on p. 89, the Court held:

> "But this view disregards the nature of the warranty. The fitness of the ship at the moment of breaking ground is the matter warranted, and not her suitability under conditions thereafter arising which are beyond the owner's control."

The implied warranty is an absolute warranty not dependent upon the owner's or charterer's knowledge or ignorance. *The Caledonia*, (1895) 157 U.S. 124; *The Edwin I. Morrison* (1894) 153 U.S. 199, 36 L. Ed. 688, 14 S. Ct. 823; *Pendleton* v. *Benner Line*, (1918) 246 U.S. 353, 62 L. Ed. 770, 38 S. Ct. 330; *Carver, Carriage By Sea*, Vol. 1 (12th Ed.) p. 100 sec. 114.

Where the contract of affreightment contains an express warranty of seaworthiness, it supersedes the implied warranty, *insofar as it extends. Carver, Carriage By Sea, supra* p. 111, 127.

In the instant case, New York Navigation agreed in Clause 1 of the Agreement of July 11th, "to provide IISMI with suitable and seaworthy vessels. . . ." Since a warranty is strictly construed, this means that the SS John Weyerhaeuser was to be seaworthy when provided or when tendered for loading. That would be on December 11, 1966, when loading commenced, or earlier, when Iligan was notified of the nomination of that ship.

Since the ship did not sail until December 16, 1966, at which time the implied warranty attached, (it not having been superseded) and the ship was unseaworthy through the entire period, New York Navigation has breached two warranties.

The parties stipulated in the July 11th Agreement that it should be subject to the law of the State of New York. New York has adopted the Uniform Commercial Code and section 2-317 of that Code provides that:

> "Warranties whether express or implied shall be construed as consistent with each other and as cumulative but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:
>
> * * *
>
> (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose."

Even if this Court should find that the package limitation survives a breach of the express warranty, it does not survive a breach of the implied warranty. *Carver's Carriage by Sea, supra*, p. 110, 127.

The Caledonia (1895) 157 U.S. 124 is still the law in this regard. The Supreme Court there quoted English Law and holds on pp. 137-8:

> "As is well said by counsel for appellee, the exceptions in a contract of carriage limit the liability but not the duty of the owner, and do not, in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel. * * * If the exceptions are capable of, they ought to receive, to use the language of Lord Selborne in *Steel* v. *Steamship Company*, "a construction not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken."
>
> There was no exception in this bill of lading which in express words exempted the shipowner from furnishing a seaworthy vessel at the commencement of the voyage. As the exceptions were introduced by the shipowners themselves in their own favor, they are to be construed most strongly

against them, and we perceive no reason why the obligation to furnish a seaworthy vessel should be held to have been contracted away by implication. Their meaning ought not to be extended to give the shipowner a protection, which, if intended, should have been expressed in clear terms. * * *

In *Tattersall* v. *National Steamship Company*,* cattle had been shipped under a bill of lading, by which it was provided that the defendants were to be "in no way responsible either for their escape from the steamer or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than £5 for each of the animals." The ship, after carrying a cargo of cattle on a previous voyage, was improperly cleaned, and those on this voyage took the foot and mouth disease. It was held that the liability of the defendants was not limited to £5 for each of the cattle, for the stipulations of the bill of lading related to the carriage of the goods on the voyage, and did not affect the obligation to have the ship fit for the reception of the cattle."

The instant case, of course, is not distinguishable from *Tattersall.*

Exceptions to the implied warranty must be clear, express, effectual and apposite. *Carver, supra*, pp. 107-9. That is not the case here.

It is submitted though that under American law, as interpreted by this Court the breach of an express warranty also deprives the carrier of all limitation clauses. *Oliver Straw Goods Corp.* v. *OSK* (2 Cir. 1931) 47 F 2d 878, 879; see also *The Flying Clipper*, (S.D.N.Y. 1953) 116 F. Supp. 386 in which a breach of the implied warranty of underdeck stowage vitiated the contract of carriage.

It should be noted that in contracts of carriage governed by the U. S. Carriage of Goods by Sea Act, 1936, any breach by the owner of its due diligence obligation occurs on the ship's breaking ground for the voyage, or *after* the bill of lading has been issued and after any declarations with respect to the nature and the value of the cargo may have been inserted in the bill of lading. The breach of the express

* 12 Q.B.D. 297.

warranty by New York Navigation took place when it tendered an unseaworthy vessel for the carriage of plaintiffs' cargo. The breach was fundamental in nature and vitiated that part of the contract as of December 11th. Since New York Navigation could not rely upon any limitation clauses in the contract because of the breach, it similarly cannot demand that Iligan in order to avoid limitation had a duty to declare and insert the nature and value of goods in a bill of lading issued after the breach.

New York Navigation had the obligation to satisfy two warranties, i.e., the express warranty of seaworthiness upon tender of the ship and the implied warranty of seaworthiness as of sailing. In its defense, and perhaps recognizing the patently unseaworthy condition of the SS John Weyerhaeuser, it urges that it did nothing. In view of its contractual obligations with respect to seaworthiness, its failure to act cannot but be characterized as wilful or gross neglect. This failure to take any steps to assure the fulfillment of its warranties constitutes a fundamental breach of the contract and all limitation provisions are unavailable to it. The fundamental nature of the breach becomes all the more apparent when one considers that even casual attention to the SS John Weyerhaeuser would have disclosed the unseaworthy condition. See *Harbutt's Plasticine Ltd.* v. *Wayne Tank & Pump Company Ltd.* (1970) 1 LLR p. 15.

The breach by New York Navigation of its express warranty was a breach of a "fundamental term" of the contract (See *Suisse Atlantique D'Armement Maritime* v. *N.V. Rotterdamsche Kolen Centrale* (1967) A.C. 361; *Carver's supra* pp. 664-665). The warranty was a condition precedent to Iligan's duty to ship his cargo on the SS John Weyerhaeuser. This duty was severable in respect to each ship supplied.

POINT IX

New York law controls the case against New York Navigation; it forbids any limitation of liability in this case by New York Navigation.

The parties stipulated that New York law would govern the July 11th Agreement (App. 11, 12; Clauses 16, 18).

McKinney's, Consolidated Laws of New York, Book 62½, Part 3, § 7-309 (2) reads:

> "Damages may be limited by a provision that the carrier's liability shall not exceed a value stated in the document if the carrier's rates are dependent upon value and the consignor by the carrier's tariff is afforded an opportunity to declare a higher value or a value as lawfully provided in the tariff, or where no tariff is filed he is otherwise advised of such opportunity; but no such limitation is effective with respect to the carrier's liability for conversion to its own use."

The freight rates charged to Iligan are variable and are set out in Clause 4 (A), (B) and (C) of the Agreement. (App. 3, 4, 5). It is fairly obvious that the rates are dependent upon cargo quantities shipped and not upon the value of the cargo.

The actual freight as computed on the face of the bill of lading (App. 35) is dependent upon the units of measure (40 cubic feet) or weight (2,240 lbs.), and not the value.

It appears, therefore, that New York Navigation's rates not having been dependent on value, it is barred by the law of New York from limiting its liability.

So even if the intention were to incorporate the package limitation, this is inconsistent with the terms of the Agreement that New York law controls and that the Agreement supersedes the bill of lading, and the attempted limitation is null and void.

POINT X

It was error to hold that Iligan had to disavow the entire July 11th agreement; it was a divisible contract.

Judge Ward held that Iligan, upon learning of the fundamental breaches of warranty by New York Navigation, should have treated the entire agreement as void, in which case the limitations may be void. But having continued to ship the rest of its steel mill under the July 11th Agreement, the lower Court held, Iligan then may be bound by any exculpatory clauses in the agreement.

The July 11th Agreement was a comprehensive document which incorporated New York Navigation's regular

form of bill of lading and envisioned the issuance of many different bills of lading as different vessels were provided for the parts of the steel mill.

(1) Since each new bill of lading became part of the contract and each new ship supplied by New York Navigation became subject to new warranties under Clause (1) and by operation of law, the contract was divisible and severable into different shipments.

(2) Three different freight rates are provided which depend upon whether or not U.S. flag vessels are employed, whether or not a minimum of 2,000 tons is shipped in one shipment and on what ports of loading are nominated by Iligan.

New York law governs the dispute between Iligan and New York Navigation. The New York Court of Appeals has held in *Ripley* v. *Int'l. Railways of Central American & United Fruit Company* (1960) 8 NY 2d 430 that where rate agreements are severable from other parts of a contract, a dispute as to that does not call for recission of the entire contract. The Court held on pp. 437-438:

> "The rule has been stated in Black on Rescission and Cancellation (2d ed., Vol. 3, sec. 585) that 'When a contract is separable or divisible into a number of elements or transactions, each of which is so far independent of the others that it might stand or fall by itself and good cause for rescission exists as to one of such portions, it may be rescinded and the remainder of the contract affirmed. And it has been held that where a contract consists of parts so distinct and independent that each could be performed without reference to the others, a failure of one of the parties to perform one of the parts of the terms of the contract does not authorize the other to rescind the whole contract, and refuse to accept a tender of performance of the remainder of the contract by the party in default'. The same principle of divisibility has been applied to restitution as essential to rescission [citing authorities]. In *Bamberger Bros* v. *Burrows* (145 Iowa 441, 451) it was said: 'If the contract consists of several distinct and in-

> dependent parts, each of which can be performed without reference to the other, a failure of one of the parties to perform one of the terms does not authorize the other to rescind the whole and refuse to accept performance of the other terms by the party so in default'."

Since the warranties of seaworthiness arose fresh with the production by New York Navigation of each new ship, Iligan could have been at fault for failing to perform under the remainder of the voyages.* It had the right and perhaps the duty to allow New York Navigation to rehabilitate itself and wish better luck with its choice of future ships. See also *New Era Homes Corp.* v. *Englebert Forster* (1949) 299 NY 3033. The law of England is the same. *Ballantine & Co.* v. *Cramp & Bosman* (1923) Vol. 129, The Law Times, p. 502.

Therefore, Iligan does not seek to nullify selected parts of one contract, as the lower Court held, but simply declares that the commercial purpose of an entire divisible part of a severable contract has been frustrated by New York Navigation's fundamental breach of that part.

This charter of July 11th covered several ships not yet designated. It is different from a time charter of a single ship in which case the implied warranty must be complied with at the commencement of sailing and does not rise fresh at the beginning of each subsequent voyage. (*Carver's*, supra, p. 307)

If a charterer knows the ship is unseaworthy, he can't reject it if it can be made fit within a reasonable time. *Carver*, supra, pp. 91-92. Mr. Best testified he'd have told Weyerhaeuser to fix the defect. In the same way, Iligan had to allow New York Navigation a chance to supply seaworthy ships for the balance of the venture.

The Agreement contemplated the use of several different ships and accordingly several different bills of lading. Since the seaworthiness of the ship is the root of a maritime adventure and since the entire contract was composed of the July 11th Agreement plus the different bills of lading, it seems obvious that this agreement was severable.

* Article 16 of the agreement stipulates that performance under it shall continue in the event of arbitration of a dispute, the parties meant it to be divisible.

Iligan had a right to treat the July 11th Agreement and the December 16th bill of lading as one contract and to disavow only that. There was no need to assume that New York Navigation would have the same bad fortune with other shipowners and ships as with the SS John Weyerhaeuser.

Any other conclusion would be absurd and unfair to all parties, including New York Navigation.

Furthermore, there is no proof as to whether the other shipments took place before or after Iligan learned of the fundamental breach of contract. This Court can't hold, therefore, that the contract was affirmed voluntarily.

Lord Justice Denning, Chief Justice of the English Court of Appeals held in *Harbutt's*, *supra*, at pp. 25-26:

> "If the innocent party, on getting to know of the breach, does not accept it, but keeps the contract in being (as in Charterhouse Credit Company Ltd. v. Tolly, [1963] 2 Q.B. 683), then it is a matter of construction whether the guilty party can rely on the exception or limitation clause, always remembering that it is not to be supposed that the parties intended to give a guilty party a blanket to cover up his own misconduct or indifference, or to enable him to turn a blind eye to his obligations. The Court may reject, as matter of construction, even the wildest exemption clause if it . . . would lead to an absurdidty or because it would defeat the main object of the contract or perhaps for other reasons. And where some limit must be read into the clause it is generally reasonable to draw the line at fundamental breaches . . . [See per Lord Reid in Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1967] 1 A.C., at p. 398; [1966] 1 Lloyd's Rep., at p. 544.]"

The absence of any evidence in the trial record as to whether Iligan disaffirmed its contract with New York Navigation is irrelevant. If Iligan had had advance knowledge of the unseaworthiness of the SS John Weyerhaeuser it certainly could have and would have disaffirmed as to cargo to be carried on that vessel. It did not know of the unseaworthiness and it would be manifestly unfair under

these circumstances to enlarge the carrier's rights in the face of their total disregard of their contractual commitments. As to whether Iligan could have disaffirmed as to subsequent shipments, assuming they did not do so, this fact cannot divest Iligan of any rights they may have had upon the defendants' breach of the contract of carriage for the SS John Weyerhaeuser voyage.

POINT XI

Weyerhaeuser had no freight agreement with Iligan and New York Navigation offered no choice of rates.

It is obvious that Iligan had no freight agreement at all with Weyerhaeuser; Iligan paid freight only under the July 11th Agreement as to rates and under the bill of lading as to actual amount of freight adjusted by weight and measurement. And it paid $320,927.33 to New York Navigation. (App. 143a).

Weyerhaeuser's only compensation was $75,000.00 per month charter hire paid by New York Navigation. (App. 391).

New York Navigation neither in the July 11th Agreement nor in the bill of lading based the freight rate upon the value of the goods, nor did it offer Iligan any choice of rates based upon value.

COGSA did not apply to New York Navigation, nor did the bill of lading inure to its benefit for reasons set forth, *supra*.

Even if COGSA did apply by law, New York Navigation's initial violation was in "providing" an unseaworthy ship, long before "tackle" was put to the goods. *Sommer Corp* v. *Panama Canal Co.*, (1974) ILLR 287 475 F. 2d 292 (5 Cir. 1973).

If it be argued nevertheless that the phrase in Clause 17 of the bill of lading

> ". . . the value of the goods shall be deemed to be $500.00 per package or per unit, on which basis the freight is adjusted . . ."

makes a difference, this phrase is obviously not true. The face of the bill of lading shows the freight was adjusted by units of "40 cubic feet" or long tons.

Therefore, Weyerhaeuser gets no benefit from Iligan's failure to declare the value of the goods. It received no freight from Iligan at all and had no power to amend the freight rate based on value.

New York Navigation had rates not dependent on value, had no tariffs and offered Iligan no choice of rates in any other way.

POINT XII

It was error to hold that New York Navigation exercised due diligence.

Judge Ward held that New York Navigation did not breach its implied warranty to exercise due diligence to furnish a seaworthy vessel; that there has been no showing that New York Navigation had any knowledge of a problem with the bilges, or was under any obligation to inspect the ship, and that the charterer was entitled to rely on Weyerhaeuser's warranty to it concerning the seaworthiness of the ship.

The difficulty with Judge Ward's conclusions on this point appear to be that:

a) New York Navigation phrased its bill of lading so as to insulate itself from any liability under that document. By not issuing it in its own name, the bill of lading is not its contract of carriage and by stipulating that it acts only as agent for the shopowner (carrier), it effectively forecloses any benefits from the Carriage of Goods by Sea Act in its favor. This then was clearly the intention of the parties.

Even Clause 17 grants only to the "carrier" a $500.00 limitation and the definition of carrier under Clause 2 does not include New York Navigation which was a voyage charterer, in fact. If it were a time charterer, it was not bound by the bill of lading.

Without the Carriage of Goods by Sea Act and without Clause 17 there is no relaxation of the terms of the warranties to the duty to exercise due diligence and there is no limitation of liability. The July 11th Agreement contains none.

b) He believes that knowledge of a defect is a condition to a finding of lack of due diligence. This is just not the law. There is a duty to inspect one's vessel to de-

termine that it is fit, even if there has been no prior notice of a defect.

This, of course, is based upon common sense for if knowledge is necessary, those carriers who maintain themselves in the purest ignorance will be the least chargeable with fault. Iligan suggests this is not the law and will never be the law.

If Judge Ward is correct then this Court has erroneously decided many cases, including *Ore SS Corp.* v. *D/S A/S Hassel* (2 Cir. 1943) 137 Fed 2d 326 where a rivet fell out of the hull and caused cargo damage. The carrier was held not to have exercised due diligence by simply making a visual inspection of the ship. This Court found that "no hammer or drill test of the rivets was employed."

Yet the carrier in *D/S A/S Hassel* made a visual inspection. New York Navigation didn't even do that.

III

One who makes an express promise to provide seaworthy vessels and is subject to the implied warranty does have an obligation to inspect the ship.

The opposite would be a remarkable concept and subject to extraordinary abuse if it be affirmed here on appeal.

Assuming that New York Navigation's duty was to exercise due diligence, it reiterated in its briefs and at the trial that it did nothing. It took great pains to convince the lower Court of this and certainly the evidence is clear that it did nothing to satisfy its promises and warranties. But this can never be considered due diligence for it puts a premium on lethargy and indifference and punishes those who seek to learn of any defects in their ships.

When a carrier conditions its warranty to provide a seaworthy ship with a duty to exercise due diligence and then fails to exercise due diligence, it leaves the warranty as an unlimited one. *Metropolitan Coal Co.* v. *Howard* (2 Cir., 1946) 155 Fed 2d 780; *Carvers, supra*, pp. 108-109.

IV

New York Navigation had no right to rely on the warranty of seaworthiness from Weyerhaeuser to it as a substitute for its own warranties.

It was error to hold that it did. New York Navigation's duties under its warranties are non-delegable. Iligan never knew of the terms of the voyage charter party, and never authorized New York Navigation to substitute the warranty to New York Navigation only from Weyerhaeuser for the ones from New York Navigation to Iligan.

The failure of Weyerhaeuser to comply with its duties can have no effect on New York Navigation's complete lack of any effort to satisfy its own warranties.

By emphasizing that New York Navigation did not know the ship was unseaworthy, Judge Ward has disregarded the law set down by Judge L. Hand in *The Pocone*, *supra*. The important test is not what it knew but what it should have known.

Judge Brown in *The Colima*, (1897), 82 Fed. 665, 678 states in reference to the Harter Act requirement of due diligence:

> ". . . the intent of the act is to relieve the shipowner from his previous warranty of absolute seaworthiness in fact, and to substitute for that warranty a warranty only of diligence, to make the ship seaworthy. This difference is of great importance, as it avoids responsibility for latent and undiscoverable defects. But the warranty of diligence remains; and this requires the application of the usual rule, that the acts and negligences of the agent are deemed those of the principal."

"Latent and undiscoverable" would be changed by Judge Ward to "obvious but undiscovered". For the same holding, read *American Linseed Co.* v. *Norfolk SS Co.* (1929) 32 Fed 2d 281; *Riverstone Meat Co.* v. *Lancashire Shipping Co.*, [1961] A.C. 807.

POINT XIII

New York Navigation violated its contract with plaintiffs by failing to stamp the bill of lading as agreed and is liable to plaintiffs therefore for all damages resulting therefrom.

The July 11, 1966 Agreement (AGREEMENT) between plaintiffs and New York Navigation reads in part in Clause 11:

> "New York Navigation agrees to stamp all bills of lading as follows: 'All the terms and conditions of this bill of lading are subject to and governed by the written contract entered into between IISMI and NYNAV for the performance of this transportation'."

The obvious purpose of this stamp was to bring the shipowner under the same duties as set forth in the Agreement, e.g. NYNAV was subject to the express warranty of seaworthiness in Clause 1. There is in the Agreement itself no limitation of liability relating to the furnishing of an unseaworthy ship. If Weyerhaeuser be granted any limitations in this case, which limitations it would not have but for the failure of New York Navigation to properly stamp the bill of lading, then New York Navigation is liable to Iligan for the difference between its total damages and any limitation amount granted to Weyerhaeuser.

CONCLUSION

Neither Weyerhaeuser nor New York Navigation are entitled to the package limitation: the judgment should be modified to hold each appellee liable to Iligan for its full damages to be proved before a commissioner.

Respectfully submitted,

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(212) 964-3553

DAVID L. MALOOF, ESQ.
Of Counsel.

EXHIBIT A

REGISTER OF SHIPS

1966-67

1 LR Identity No. / Call Sign / Official No. / Navigational aids	2 SHIP'S NAME / Former names / OWNERS / Managers / Port of Registry / Flag	3 TONS / Gross / Net / Summer Deadwt / Gross / Net / Summer Deadwt	4 CLASSIFICATION / Hull / Latest SS recorded / Machinery / Refrigerated cargo installation / Machinery numeral / Equipment letter	5 HULL / Date of build / Shipbuilders—Place of build / Length overall / Breadth extreme / Draught maximum / Length B.P. / Breadth moulded / Depth moulded / Superstructures / Decks / Riveted/Welded / Bulkheads / Alterations / Rise of floor / Keel / Water ballast	6 CARGO CAPACITIES/HANDLING / Description of ship / No. of Passengers / No. of Holds & lengths/No. of Cargo tanks / Grain/Liquid c.ft. / Bale c.ft. / Insulated spaces c.ft. / Heating coils / No. of Hatchways & sizes / No. of Winches / Cranes/Derricks No./SWL tons	7 MACHINERY / Engines / Bore and stroke / Total horsepower / Type / Fuel Bunkers (tons) / Enginebuilders / Where manufactured / Boilers / Heating surface / Furnaces / Aux. electrical generating plant / Special propellers / Speed knots
				rf 6"		
517458 KWJD 245356 DI Esd Gc Rdr	JOHN WEYERHAEUSER exEdward B. Haines-47 Weyerhaeuser Co. Tacoma United States	7272 4435 10841	AB	1944 Bethlehem-Fairfield—Ba. 441' 6" 57' 0" 27' 9½" 417' 9" 56' 11" 37' 4" 2 dks, 3rd dk fwd RW rf 6"	S 5 Ho 60½', 72½', 48½', 63½', 84' G563008 B.499573 5 Ha (stl) (33½', 34½', 19½', 34½', 34½' x 19½') 12W Der 2(10) 8(5)	T 3Cy. 24½" 37" & 70" x 48" 2500ihp 1819t (o.f) General Mchy. Corp. Hamilton 2 x 150kW 110/208V 60c/s a.c. 11½k

EXHIBIT B

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July 11, 1972

Donovan, Donovan, Maloof
& Walsh, Esqs.
161 William Street
New York, New York 10038

Attn: David L. Maloof, Esq.

S.S. JOHN WEYERHAEUSER -
67 Civ. 1137 Cal. 646 (4)
Your File GM 372 DMK
Our File 102-5141

Dear Sirs:

Please be advised that Defendant New York Navigation intends to call at trial Allan Harley and/or August Grievers and/or Ralph Bercovici, all New York Navigation employees. In addition, said Defendant intends to call National Cargo Bureau surveyors B.B. Hall and/or C.C. Page and/or Captain A. Jones and/or G. DeGroote.

In addition, said Defendant intends to call Captain William Wheeler as an expert witness.

Very truly yours,

HAIGHT, GARDNER, POOR & HAVENS

By M. E. DeOrchis

DeO:ML
cc:
Symmers, Fish &
Warner, Esqs.
Attn: William Warner, Esq.
File# 7207

EXHIBIT C

GROSS NEGLIGENCE OF CARRIER

FULL RECOVERY OF DAMAGE

Court of Appeals of ROUEN

Official Session of June 7, 1955

In the case of: French State (Direction of Maritime Transportation) vs. Boyer

The Court,

Acting as the court of review following the decision of the Supreme Court of July 6, 1954, setting aside and annulling the decision of the Court of Appeals of Paris of March 12, 1951 in the appeal properly filed by the French State against the judgment given on January 12, 1948 by the Commercial Court of the Department of Seine, which finding that the French State, represented by the Direction of Maritime Transportation, has requisitioned the merchant marine and has become thereby the sole carrier responsible for transportation and consequently, for transportation of 28 cases of pull-overs abord the s/s "Strasbourgeois" from Casablanca to Marseilles, dismissed Boyer's complaint against the Compagnie Generale Transatlantique, and interpreting as a wrong the gross negligence allegedly committed by the Direction of Maritime Transportation by submitting proof of absolute absence of surveillance, declared that the limitation of responsibility imposed by article 5 of the law of April 2, 1936 does not bar Boyer and condemned the French State, represented by the Direction of Maritime Transportation, to pay to Boyer the sum of Frs. 349,079 in reimbursement for merchandise lost in the course of maritime carriage, Frs. 20,000 as damages for commercial prejudice and Frs. 5,220 for expense of certificate of damage.

(continued)

Whereas the law of April 2, 1936, in article 5, defines the rules for reimbursement of value of packages lost, partially or totally damaged in the course of maritime carriage, substituting free valuations of the parties by the obligation, irrespective of the cause of loss, of limiting the amount to be reimbursed to a rate determined precisely, unlesse a declaration of value has been inserted in the Bill of Lading before shipment;

Whereas this is a legal provision destined to take place of a contractual provision with respect to eventual determination of carrier's responsibility in cases where such responsibility is engaged on the occasion of operations exposed only to hazards which are accidental and inherent in bona fide carriage, with the exclusion of hazards which may eventually arise from willful fault;

Whereas the interpretation thus given to the legal provision arises from the place occupied in the text by article 5 prohibiting, in the absence of declaration of value, the exceeding "in any case" of the rate fixed for carrier's liability, this article following immediately article 4 which precisely lists the only acts of loss or accidental damage to be all considered in relation to abnormal or accidental events which could be foreseen, outside of any willful fault;

Whereas, on the other hand, in the matter of contracts, gross negligence is, if not by nature, then at least by its effects, in all points and in all respects legally to be assimilated with dolus, when it permits to suppose in a contracting party, even in the absence of intention of malice, such failure in performance of the contract as to constitute a veritable violation of the contract;

(continued)

Whereas in fact by reasons of elements judicially adopted by the first judge and supported by this court, there are reasons to consider that this loss had gross negligence in the sense defined above as its cause;

That such gross negligence was produced by an omission that may be imputed to an agent of the carrier, guilty of inexcusable negligence;

Whereas that there is therefore no reason to restrain in its application the principle established in French law that gross negligence is to be considered as equivalent to dolus;

Whereas, just as dolus, gross negligence thus understood, is not subject to the application of rules;

Whereas, in consequence, the limitation applicable in reimbursement of value of packages lost or damaged, imposed in the absence of declaration of value in most absolute and imperative manner by article 5 of the law of April 2, 1936, does not apply in this matter;

For these reasons and for those found by the first judge,

Acting upon the decision of the Supreme Court of July 6, 1954;

The Court affirms the decision and affirms the judgment against French State represented by the Direction of Maritime Transportation;

Sets aside all the conclusions which are foreign or contrary to this decision;

Condemns in addition the French State, represented by the Direction of Maritime Transportation to pay the expenses.

(continued)

President: M. Ricaud (First President)

Clerk of Court: M. Homet

General Counsel: M. Pasturel

Counsel: Jean de Grandmaison for the Direction of Maritime Transportation and Francis Sauvage for Mr Boyer. .

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